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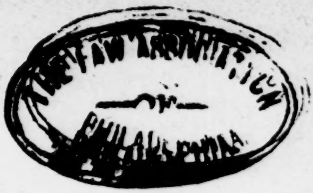

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 287.

AUGUSTUS F. SHAPLEIGH, PLAINTIFF IN ERROR,

vs.

THE CITY OF SAN ANGELO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED JUNE 3, 1895.

(15,929.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 4, 1897.

1 *Caption.*

Be it remembered that there was opened and begun to be holden a regular term of the United States circuit court of fifth circuit and western district of Texas, at El Paso, on the first day of April, A. D. 1895, it being the first Monday in said month and the day fixed by law for commencing a regular term of said court at said place—present, the Honorable Thomas S. Maxey, United States district judge for the western district of Texas; Robert U. Culberson, United States attorney for said district; Richard C. Ware, United States marshal for said district, and D. H. Hart, clerk of said court—during which term the following proceedings, among others, were had, to wit:

AUGUSTUS F. SHAPLEIGH, Plaintiff,
vs.
THE CITY OF SAN ANGELO, Defendant. } No. 180.

2 *Plaintiff's First Amended Original Petition.*

Filed March 9th, 1895.

UNITED STATES OF AMERICA,
Western District of Texas.

In the Circuit Court.

AUGUSTUS F. SHAPLEIGH, Plaintiff,
vs.
THE CITY OF SAN ANGELO, Defendant. } No. 180.

To the judges of the United States circuit court, 5th circuit, western district of Texas, El Paso division:

And now comes Augustus F. Shapleigh, plaintiff, and, with leave of the court, amends his original petition filed on March 5th, 1894, and for amendment and in lieu of his said original petition says:

1st. Augustus F. Shapleigh, plaintiff, complaining of The City of San Angelo, defendant, represents that the plaintiff is a citizen of the State of Missouri and the defendant a city of the State of Texas, duly incorporated under the laws of said State, and as such a citizen of said State and of the western district thereof.

2nd. That heretofore, to wit, on the 18th day of January, 1889, the county judge of the county of Tom Green, in said State of Texas, made an entry upon the records of the commissioner's court of said county setting forth that the inhabitants of the town of San Angelo, in said county, were then and there incorporated as a city within the following limits and bounds, to wit:

Beginning at the southeast corner of survey No. 326, in the name of George Schubitz, thence north to an intersection with north boundary line of survey No. 1112, in the name of the C. C. & S. D.

R. R. Co.; thence west to southwest corner of Pointevant survey No. 1114; thence westerly, crossing North Concho river, to the corner between survey 191, in the name of John Mohel, and survey 192, same grantee; thence southeasterly, following the meanders of the North Concho river, to the southeast corner of survey
3 No. 189, in the name of Phil. Schillentrager; thence south 60° west along the north boundary line of survey No. 188, in the name of Edward Schmidt, to a point north 30° west of the northwest corner of survey No. 186, in the name of James A. Frick; thence south 30° east to southwest corner of said survey No. 186; thence east to intersection of boundary line of survey No. 174, in the name of Emil Herbes; thence south to southwest corner of survey No. 174, on bank of main Concho; thence, crossing the said river, to a point opposite said corner; thence down said river with its meanders to a point opposite the mouth of North Concho; thence down the main Concho with its meanders to a point opposite the southeast corner of survey No. 326; thence across the river to the place of beginning.

3rd. That on the 18th day of January, 1889, said city contained more than one thousand inhabitants; that immediately thereafter an election was held in said city, pursuant to an order of the said county judge, at which election a mayor, a marshal, and five aldermen were elected, who thereupon organized a government for said city and entered upon the performance of their duties as such officers; that from that time forward said city and the inhabitants thereof conducted a city government, held elections, enacted and enforced ordinances, made contracts, created and paid debts and salaries, levied and collected taxes, created public city improvements, and in every way performed the functions of a city.

4th. That thereafter, to wit, on the 16th day of May, 1889, the city council of said city passed an ordinance entitled "An ordinance authorizing the issuing of bonds for the purpose of improving the streets and public highways in the city of San Angelo and to provide for the interest and create a sinking fund for the principal of said bonds," wherein and whereby it was ordained that the mayor and secretary of the city be, and they were, authorized to execute under the corporate seal of the city and to negotiate coupon bonds of the denomination of $1,000 each, and that for the payment of the interest on said bonds and to create a sinking fund for the redemption of the same there should be levied and collected an annual ad valorem tax on all property within said city at the rate of 25 cents on the $100 of valuation.

Plaintiff states that in pursuance of said ordinance the said mayor signed and said secretary countersigned and the mayor
4 negotiated and sold ten certain bonds, sealed with the corporate seal of said city, numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in words and figures following, to wit:

UNITED STATES OF AMERICA, *State of Texas, City of San Angelo.*

No. 4. *City Improvement Bond.* $1,000.

Know all men by these presents, that the City of San Angelo, in the county of Tom Green, State of Texas, for value received, hereby promises to pay to bearer on the first day of January, 1909, one thousand dollars, lawful money of the United States of America, with interest thereon at the rate of six per cent. per annum from date hereof, payable semi-annually on the first days of November and May in each year upon the presentation and surrender of the coupons hereto attached as they may fall due, the principal and interest of this bond payable at the Hanover National bank in the city of New York.

This bond is one of a series of twenty bonds of like tenor and date, of the denomination of one thousand dollars each, issued by said city of San Angelo, under authority of art. 420 to 424, chapter 4, Revised Statutes of Texas, as amended by chapter 55 of the 20th legislature of said State, approved March 23rd, 1887, and of city ordinance in conformity thereto, approved May 16th, 1889, and is issued for the purpose of street improvement for said city. To secure the payment of the interest and principal of said bonds a tax levy of 25c. on each $100 has been made, and a sufficient amount from any other revenue of the city to make up for any possible deficiency is provided for by ordinance.

In testimony whereof, the said city by its council has caused this bond to be signed by the mayor of the city and attested by the city secretary, with the city seal attached, this 1st day of May, A. D. 1889.

J. G. PREUSSER, *Mayor.*

[SEAL.]

Attest: JOHN F. MOORKENS, *City Sec'y.*

5th. That attached to each of said bonds there were 40 coupons, each for the sum of $30, and representing one semi-annual installment of interest on said bond, maturing respectively on the
5 first days of May and November in each year; that one of said coupons is in words and figures following:

$30. *Coupon.* $30.

The City of San Angelo, Tom Green county, Texas, will pay to bearer thirty dollars on May 1st, 1892, at the Hanover National bank, in the city of New York, being interest due at that date on street-improvement bond No. 4, for one thousand dollars, of date May 1st, 1889.

JOHN F. MOORKENS, *City Sec'y.*

6th. That all the other coupons are the same in tenor and effect, except as to the date of maturity and the number of bond to which they are severally attached.

7th. That before said bonds were issued the said mayor forwarded the same to the comptroller of public accounts of the State of Texas,

who thereupon registered the same in a book kept for that purpose in his office, and endorsed on each of said bonds his certificate that the same was so registered. Plaintiff states that at the time said bonds were so issued the assessed value of the property in said city amounted to $1,500,000, and that said bonds were issued and their proceeds were used for the purpose of making and building streets in said city.

8th. That heretofore, to wit, at the fall term, 1890, of the district court of Tom Green county, in said State, one T. C. Winn, then the county attorney of said county, at the instance of one D. D. Wallace, a citizen and tax-payer of said town of San Angelo, by leave of said court, filed an information against J. G. Preusser, W. S. Veck, Marion Robertson, Joseph Tweedy, W. S. Kelley, and J. S. Shupert, wherein it was alleged that said Preusser, Veck, Robertson, Tweedy, Kelly, and Shupert were exercising and performing the duties, privileges, and functions of a mayor and city council of said city of San Angelo, claiming the same to be a city duly and legally incorporated by virtue of chapter 11, title 17, Revised Statutes of said State, whereas in truth and in fact, as it was alleged, said city was never legally incorporated and said defendants were unlaw-
6 fully performing and exercising the said functions, and the said information prayed that the said defendants be cited to appear and show cause, if any they had, why they should not be ousted from office, and that said incorporation be declared null and void; that thereupon such proceedings were had in said case that on the 15th day of December, 1891, the said district court entered a decree ousting the said defendants from their said offices and adjudging that the incorporation of the said town of San Angelo be, and the same was, abolished and declared to be null and void.

9th. That on the 10th day of February, 1892, in pursuance of a vote of a majority of the legal voters, tax-paying property-holders residing within the limits hereinafter described, the county judge of said county made an entry upon the records of the commissioner's court of said county, a copy of which is hereto annexed, marked Exhibit A, setting forth that the inhabitants of the City of San Angelo, defendant herein, were then and there incorporated as a city within the following limits and bounds, to wit:

Beginning on the south bank of the North Concho at the northwest corner of what is known as "Millspaugh's addition" to the town of San Angelo, thence in a southerly direction to the southwest corner of said "Millspaugh addition;" thence in southeastern direction, on a straight line, to the southwest corner of the two-acre tract of land owned by the San Angelo Water Works Co. (for a more clear identification of said corner reference is here made to the map and description thereof in the condemnation proceedings by said company *vs.* Adams & Wicks for said land); thence east to the southeast corner of said two-acre tract of land, down said river to the northeast corner of said two-acre tract of land; thence in a northern direction to the north bank of the North Concho river, at the common river corner of what is known as the "Walters Brewery property" and the "San Angelo Mills property," said property being the

plats of land marked on the Frank Lerch printed map of San Angelo as San Angelo mills and Walters' brewery respectively; thence down the North Concho river, with its meanders, to its junction with the South Concho river; thence down the main Concho river to the common corner of what is known as the "Cunningham and McGregor addition" and the Wm. Childress place, being the southeast corner of said "Cunningham and McGregor addition" and
7 southwest corner of the said Childress place; thence in a northern direction, on the east line of said "Cunningham and McGregor addition," to the southwest corner of the tract of land owned by Chas. Hobbs and on which said Hobbs resides; thence east to the southeast corner of said Hobbs' place; thence in a northern direction to the northwest corner of the Geo. E. Webb place, being the tract or parcel of land bought by Geo. E. Webb and now occupied by I. P. Wetmore; thence east to the said east line of "Cunningham and McGregor addition;" thence north with said east line of said addition to Koberlin street, as shown by the map of said addition filed in the clerk's office of Tom Green county and by the said Frank Lerch map heretofore referred to; thence with said Koberlin street west to "Avenue A," said addition; thence with and along said Avenue A to the north line of the "right of way" of the Gulf, Colorado & Santa Fe R. R. Co.; thence in a southwesterly direction with said north line of said "right of way" to its intersection with the east line of survey No. 324, in the name of Geo. Rodi; thence in a western direction to the northeast corner of survey No. 322, in the name of C. Sallinger; thence in a southwestern course to the southeast corner of the five acre tract of land shown on said Frank Lerch map of San Angelo as Wm. E. Ellis, being a subdivision of survey No. 321, in name of M. Heimner; thence in a northern direction along the east line of said Ellis five-acre tract, the five-acre tract known as the "Cassius Carter" tract, the five-acre tract known as the "Jackson & Carter" tract, and extension of said east line to the north line of survey No. 321, in name of M. Heimner; thence in a western direction with said north line of said survey No. 321 to the west bank of the Miles irrigating ditch, being the long ditch running from the dam into the city of San Angelo; thence with the said south bank of said ditch to the north line of the G., C. & S. F. R. R. Co. right of way; thence with the said north line of said right of way to the south bank of the North Concho river; thence down said south bank of the North Concho river with its meanders to the place of beginning.

10th. That the territory embraced within the limits last above described in count 9 is all embraced within the limits first above described in count 2, and includes all the lands within said first-described limits actually occupied and inhabited as a town, and
8 includes all the streets and improvements created or acquired by said city, as first organized in 1889, with the proceeds of said bonds, as above stated, and all the public buildings and property thereof, and that said city and the inhabitants thereof are now and long have been daily using said streets, improvements, build-

ings, and property; which street improvements and buildings were paid for with the proceeds of said bonds.

11th. That he is the bearer and owner of sixty of the coupons attached to the above-described bonds, to wit, those which matured on the first day of May, 1892; those which matured on the 1st day of November, 1892; those which matured on the 1st day of May, 1893; those which matured on the 1st day of November, 1893; those which matured on the 1st day of May, 1894, and those which matured on the 1st day of November, 1894, and that all said coupons are unpaid.

12th. That defendant, by reason of the premises, became liable and promised plaintiff to pay him the sums of money in said coupons specified, according to the tenor and effect thereof; that eighteen hundred dollars of said sum of money is now due, and defendant, though often requested, has refused and still refuses to pay the same or any part thereof, to plaintiff's damage eighteen hundred dollars.

13th. Wherefore plaintiff prays judgment against defendant for the sum of eighteen hundred dollars, with interest on each of said coupons from the maturity thereof at the rate of six per cent. per annum, and for his costs and for general relief.

14. For another and further cause of action the plaintiff states that heretofore, to wit, on the 18th day of January, 1889, the county judge of the county of Tom Green, in said State, made an entry upon the records of the commissioner's court of said county, setting forth that the inhabitants of the town of San Angelo, in said county, were then and there incorporated as a city within the following limits and bounds, to wit:

Beginning at the southeast corner of survey No. 326, in the name of George Schubitz, thence north to an intersection with north boundary line of survey No. 1112, in the name of the C. C. & S. D. R. R. Co.; thence west to southwest corner of Pointevant survey No. 1114; thence westerly, crossing North Concho river, to the corner between survey 191, in the name of John Mohel, and survey 192, same grantee; thence southeasterly, following the meanders of the North Concho river, to the southeast corner of survey No. 189, in name of Phil. Schillentrager; thence south 60° west along the north boundary line of survey No. 188, in the name of Edward Schmidt, to a point north 30° west of the northwest corner of survey No. 186, in the name of James A. Frick; thence south 30° east to southwest corner of said survey No. 186; thence east to intersection of boundary line of survey No. 174, in name of Emil Herbes; thence south to southwest corner of survey No. 174, on bank of main Concho; thence, crossing the said river, to a point opposite said corner; thence down said river, with its meanders, to a point opposite the mouth of North Concho; thence down the main Concho, with its meanders, to a point opposite the southeast corner of survey No. 326; thence across the river to the place of beginning.

9

15th. That on the 18th day of January, 1889, said city contained more than one thousand inhabitants; that immediately thereafter

an election was held in said city pursuant to an order of the said county judge, at which election a mayor, a marshal, and five aldermen were elected, who thereupon organized a government for said city and entered upon the performance of their duties as such officers; that from that time forward said city and the inhabitants thereof conducted a city government, held election, enacted and enforced ordinances, made contracts, created and paid debts and salaries, levied and collected taxes, created public improvements, and in every way performed the functions of a city.

16th. That thereafter, to wit, on the 16th day of May, 1889, the city council of said city passed an ordinance entitled "An ordinance authorizing the issuing of bonds for the purpose of improving the streets and public highways in the city of San Angelo, and to provide for the interest and create a sinking fund for the principal of said bonds," wherein and whereby it was ordained that the mayor and secretary of the city be, and they were, authorized to execute under the corporate seal of the city and to negotiate coupon bonds of the denomination of $1,000 each, and that for the payment of the interest on said bonds and to create a sinking fund for the redemption of the same there should be levied and collected an annual ad valorem tax on all property within said city at the rate of 25 cents on the $100 of valuation.

17th. That in pursuance of said ordinance the said mayor signed and said secretary countersigned and the mayor negotiated and sold ten certain bonds, sealed with the corporate seal of said city, numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in words and figures following, to wit:

UNITED STATES OF AMERICA, *State of Texas, City of San Angelo.*

No. 4. *City Improvement Bond.* $1,000.

Know all men by these presents, that the City of San Angelo, in the county of Tom Green, State of Texas, for value received, hereby promises to pay to bearer on the first day of January, 1909, one thousand dollars, lawful money of the United States of America, with interest thereon at the rate of six per cent. per annum from date hereof, payable semi-annually on the first days of November and May in each year upon the presentation and surrender of the coupons hereto attached as they may fall due, the principal and interest of this bond payable at the Hanover National bank in the city of New York.

This bond is one of a series of twenty bonds of like tenor and date of denomination of one thousand dollars each, issued by said city of San Angelo under authority of art. 420 to 424, chapter 4, Revised Statutes of Texas, as amended by chapter 55 of the 20 legislature of said State approved March 23rd, 1887, and of city ordinance in conformity thereto, approved May 16th, 1889, and is issued for the purpose of street improvement for said city.

To secure the payment of the interest and principal of said bonds a tax levy of 25c. on each $100 has been made and a sufficient

amount from any other revenue of the city to make up for any possible deficiency is provided for by ordinance.

In testimony whereof, the said city by its counsel has caused this bond to be signed by the mayor of the city and attested by
11 the city secretary with the city seal attached, this 1st day of May, 1889.

J. G. PREUSSER, *Mayor.*

[SEAL.]
Attest: JOHN F. MOORKENS, *City Sec'y.*

18th. That before said bonds were issued the said mayor forwarded the same to the comptroller of public accounts of the State of Texas, who thereupon registered the same in a book kept for that purpose in his office and endorsed on each of said bonds his certificate that the same was so registered. Plaintiff states that at the time said bonds were so issued the assessed value of the property in said city amounted to $1,500,000, and that said bonds were issued and their proceeds were used for the purpose of making and building streets in said city.

19th. That heretofore, to wit, at the fall term of 1890 of the district court of Tom Green county, in said State, one T. C. Winn, then the county attorney of said county, at the instance of one D. D. Wallace, a citizen and tax-payer of said town of San Angelo, by leave of said court filed an information against J. G. Preusser, W. S. Veck, Marion Robertson, Joseph Tweedy, W. S. Kelly, and J. S. Shupert, wherein it was alleged that said Preusser, Veck, Robertson, Tweedy, Kelly, and Shupert were exercising and performing the duties, privileges, and functions of a mayor and city council of said city of San Angelo, claiming the same to be a city duly and legally incorporated by virtue of chapter 11, title 17, Revised Statutes of said State, whereas in truth and in fact, as it was alleged, said city was never legally incorporated and said defendants were unlawfully performing and exercising the said functions; and the said information prayed that the said defendants be cited to appear and show cause, if any they had, why they should not be ousted from office, and that said incorporation be declared null and void. Plaintiff states thereupon such proceedings were had in said case that on the 15th day of December, 1891, the said district court entered a decree ousting the said defendants from their said offices and adjudging that the incorporation of the said town of San Angelo be, and the same was, abolished and declared null and void.

20th. That on the 10th day of February, 1892, in pursuance of a vote of a majority of the legal voters tax-paying property-
12 holders residing within the limits hereafter described, the county judge of said county made an entry upon the records of the commissioners' court of said county, a copy of which is hereto annexed, marked Exhibit A, setting forth that the inhabitants of the City of San Angelo, defendant herein, were then and there incorporated as a city within the following limits and bounds, to wit:

Beginning on the south bank of the North Concho at the northwest corner of what is known as "Millspaugh's addition" to the

town of San Angelo, thence in a southerly direction to the southwest corner of said "Millspaugh's addition;" thence in southeastern direction, on a straight line, to the southwest corner of the two-acre tract of land owned by the San Angelo Water Works Co. (for a more clear identification of said corner reference is here had to the map and description thereof in the condemnation proceedings by said company *vs.* Adams & Wicks for said land); thence east to the southeast corner of said two-acre tract of land, down said river to the northeast corner of said two-acre tract of land; thence in a northern direction to the north bank of the North Concho river, at the common river corner of what is known as the "Walters Brewery property" and the "San Angelo Mills property," said property being the plats of land marked on the Frank Lerch printed map of San Angelo as San Angelo mills and Walters' brewery respectively; thence down the North Concho river, with its meanders, to its junction with the South Concho river; thence down the main Concho river to the common corner of what is known as the "Cunningham and McGregor addition" and the Wm. Childress place, being the southeast corner of said "Cunningham and McGregor addition" and the southwest corner of the said Childress place; thence in a northern direction, on the east line of said "Cunningham and McGregor addition," to the southwest corner of the tract of land owned by Chas. Hobbs and on which said Hobbs resides; thence east to the southeast corner of said Hobbs' place; thence in a northern direction to the northwest corner of the Geo. E. Webb place, being the tract or parcel of land bought by Geo. E. Webb and now occupied by I. P. Wetmore; thence east to the said east line of Cunningham and McGregor addition; thence north with said east line of said addition to Koberlin street, as shown by the map of said addition filed in the clerk's office of Tom Green Co. and by the said
13 Frank Lerch map heretofore referred to; thence with said Koberlin street west to Avenue A, said addition; thence with and along said Avenue A to the north line of the "right of way" of the Gulf, Colorado & Santa Fe R. R. Co.; thence in a southwestern direction with said north line of said "right of way" to its intersection with the east line of survey No. 324, in the name of Geo. Rodi; thence in a western direction to the northeast corner of survey No. 322, in the name of C. Sallinger; thence in a southwestern course to the southeast corner of the five-acre tract of land shown on said Frank Lerch map of San Angelo as "Wm. E. Ellis," being a subdivision of survey No. 321, in name of M. Heimner; thence in a northern direction along the east line of said Ellis five-acre tract, the five-acre tract known as the "Cassius Carter" tract, the five-acre tract known as the "Jackson & Carter" tract, and an extension of said east line to the north line of survey No. 321, in name of M. Heimner; thence in a western direction with said north line of said survey No. 321 to the west bank of the Miles irrigating ditch, being the long ditch running from the dam into the city of San Angelo; thence with the said south bank of said ditch to the north line of the G., C. & S. F. R. R. Co. right of way; thence with the said north line of said right of way to the south bank of the North Concho

river; thence down said south bank of said river, with its meanders, to the place of beginning.

21st. That the territory embraced within the limits last above described in count 20 is all embraced within the limits first above described in count 14 and includes all the lands within said first-described limits in count 14 actually occupied and inhabited as a town, and includes all the streets and improvements created or acquired by said city as first organized with the proceeds of said bonds, as above stated, and all the public buildings and property thereof, and that said city and the inhabitants thereof are now and long have been daily using said streets, improvements, and buildings and property.

22nd. That prior to the 15th day of December, 1891, the city of San Angelo, as first organized in 1889, sold and delivered the ten bonds hereinabove described to August J. Weil and the Donaldson Bond & Stock Co., both of the city of St. Louis, in the State of Missouri, for the consideration of ten thousand dollars in money,
14 then paid to said city; that the proceeds of said sale was the money used by said city in making and building its streets as aforesaid; that thereafter said Weil and said Donaldson Bond & Stock Co., for valuable consideration, sold part of said bonds to this plaintiff and the remainder to one Henry C. Clarke and one John D. Hibbeler, from whom the plaintiff subsequently purchased the same, so that plaintiff is now the owner of all said bonds and of the entire claim against the defendant as for money had and received to the plaintiff's use.

Wherefore the plaintiff prays judgment against defendant for the sum of ten thousand dollars, with interest, and costs.

T. K. SKINKER &
W. B. MERCHANT,
Attorneys for the Plaintiff.

EXHIBIT A.

In the Matter of the Incorporation of THE CITY OF SAN ANGELO.

Whereas heretofore, to wit, on the 8th day of January, 1892, sixty qualified voters of the town of San Angelo, in Tom Green county, Texas, presented to me their petition praying for an election submitting to the voters of said town the question of incorporating said town within the limits hereinafter described by field-notes;

And whereas, by virtue of the authority by law vested in me, I, W. D. Cochran, judge of said county, did, on the 19th day of January, 1892, order an election to be held upon the 9th day of February, 1892, to determine whether or not the said city of San Angelo shall be incorporated within the following-described limits, and said election having been held in accordance with law upon the 9th day of February, 1892, and it appearing to me by the returns of the officers who held said election, made to me, that a majority of the votes cast at said election were for incorporation,

to wit, the total number of votes polled being 530—corpora-
15 tion, 449; no corporation, 70; against corporation, 6; for corporation, 3; illegal, 2—I hereby declare that the inhabitants of said city of San Angelo, in Tom Green county, Texas, are incorporated as a city within the following limits and bounds, to wit:

Beginning on the south bank of the North Concho, at the northwest corner of what is known as Millspaugh's addition to the town of San Angelo, thence in a southerly direction to the southwest corner of said Millspaugh's addition; thence in southeastern direction, on a straight line, to the southwest corner of the two-acre tract of land owned by the San Angelo Water Works Co. (for a more clear identification of said corner reference is here had to the map and description thereof in the condemnation proceedings by said company *vs.* Adams & Wicks for said land); thence east to the southeast corner of said two-acre tract of land, down said river to the northeast corner of said two-acre tract of land; thence in a northern direction to the north bank of the North Concho river, at the common river corner of what is known as the "Walters Brewery property" and the "San Angelo Mills property," said property being the plats of land marked on the Frank Lerch printed map of San Angelo as San Angelo mills and Walters brewery respectively; thence down the North Concho river, with its meanders, to its junction with the South Concho river; thence down the main Concho river to the common corner of what is known as the "Cunningham and McGregor addition" and the Wm. Childress place, being the southeast corner of said "Cunningham and McGregor addition" and the southwest corner of the said Childress place; thence in a northern direction, on the east line of said "Cunningham and McGregor addition," to the southwest corner of the tract of land owned by Chas. Hobbs and on which said Hobbs resides; thence east to the southeast corner of said Hobbs place; thence in a northern direction to the northwest corner of the Geo. E. Webb place, being the tract or parcel of land bought by Geo. E. Webb and now occupied by I. P. Wetmore; thence east to the said east line of "Cunningham and McGregor addition;" thence north with said east line of said addition to Koberlin street, as shown by the map of said addition filed in the clerk's office of Tom Green county and by the said Frank Lerch map heretofore referred to; thence with said Koberlin street west to "Avenue A," said addition; thence with and along said Avenue A to the north line of the right of way of the Gulf, Colorado
& Santa Fe R. R. Co.; thence in a southwestern direction with
16 said north line of said "right of way" to its intersection with the east line of survey No. 324, in the name of Geo. Rodi; thence in a western direction to the northeast corner of survey No. 322, in the name of C. Sallinger; thence in a southwestern course to the southeast corner of the five-acre tract of land shown on said Frank Lerch map of San Angelo as "Wm. E. Ellis," being a subdivision of survey No. 321, in name of M. Heimner; thence in a northern direction along the east line of said Ellis five-acre tract, the five-acre tract known as the "Cassius Carter" tract,

the five-acre tract known as the "Jackson & Carter" tract, and an extension of said east line to the north line of survey No. 321, in name of M. Heimner; thence in a western direction with said north line of said survey No. 321 to the west bank of the Miles irrigating ditch, being the long ditch running from the dam into the city of San Angelo; thence with the said south bank of said ditch to the north line of the G., C. & S. F. R. R. Co. right of way; thence with the said north line of said right of way to the south bank of the North Concho river: thence down said south bank of said river, with its meanders, to the place of beginning, the said town to be known as and incorporated under the name of the "City of San Angelo."

Given under my hand and official signature this 10th day of February, A. D. 1892.

W. D. COCHRAN,
County Judge, Tom Green Co., Texas.

THE STATE OF TEXAS, }
County of Tom Green. }

I, Ed. Duggan, clerk of the county court of Tom Green county, Texas, do hereby certify that the foregoing is a true and correct copy of the declaration of the county judge of Tom Green county declaring San Angelo an incorporated city, as the same appears of record in the minutes of the commissioner's court of said county, in Book "3," pages 404 and 405.

In testimony whereof witness my hand and seal of said
[SEAL.] court, at office, in San Angelo, this 17th day of January, A. D. 1894.

ED. DUGGAN,
Clerk County Court, Tom Green County, Texas.

(Endorsement:) No. 180. Augustus F. Shapleigh *vs.* The City of San Angelo. Plaintiff's first amended original petition. Filed March 9, '95. D. H. Hart, clerk, by J. P. Hodgson, deputy.

17 *Citation for the City of San Angelo, Served on the Mayor.*

Executed March 19th, 1894.

No. 180.

Citation in Circuit Court.

UNITED STATES OF AMERICA, }
Western District of Texas, at El Paso. }

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to summon the City of San Angelo, a duly incorporated city of the county of Tom Green, in the western district of Texas, by and through the mayor thereof, if to be

found therein, to be and appear before the honorable circuit court of the United States, at a court to be holden in and for said district, at El Paso, on the first Monday, being the second day, of April, A. D. 1894, to answer the petition and complaint of A. F. Shapleigh, plaintiff, exhibited and filed in said court on the 5th day of March, A. D. 1894, against The City of San Angelo, defendant, numbered on docket of said court No. 180, of which petition you will serve the said mayor of the city of San Angelo, Texas, with the accompanying certified copy, and also with a true copy of this writ.

The nature of plaintiff's demand is as follows, to wit: See copy of petition hereto attached and made part hereof.

Herein fail not, but have you then and there, before said court, this writ, with your action thereon showing how you have executed the same.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said court, hereto affixed, at El Paso, this 5th day of March, A. D. 1894, and the 118th year of our Independence.

Issued same day.

[SEAL.] D. H. HART, *Clerk of said Court,*
By WARNER A. GIBBS, *Deputy.*

17*a* (Endorsement:) Original. No. 180. United States circuit court, western district of Texas, at El Paso. A. F. Shapleigh *vs.* The City of San Angelo. Citation for mayor of city of San Angelo, Tex., Tom Green county. Issued 5th day of March, 1894. D. H. Hart, clerk, by Warner A. Gibbs, dep.

Marshal's Return.

Came to hand this 14th day of March, 1894, and executed on the 19 day of March, 1894, by delivering to the mayor of San Angelo, in person, a true copy of this writ, and also a certifiec copy of the petition in this cause accompanying it.

R. C. WARE, *U. S. Marshal,*
By GEO. A. SCARBOROUGH, *Deputy.*

Mileage of marshal	$
Mileage of deputy	42 00
Service	2 00
Total	$44 00

Citation Served on City Clerk of the City of San Angelo.

Executed March 19th, 1894.

No. 180.

Citation in Circuit Court.

UNITED STATES OF AMERICA, }
Western District of Texas, at El Paso. }

The President of the United States to the marshal of the western district of Texas, Greeting:

You are hereby commanded to summon the City of San Angelo, a duly incorporated city of the county of Tom Green, in the western district of Texas, by and through the city clerk thereof, if to be found therein, to be and appear before the honorable circuit court of the United States, at a court to be holden in and for said district, at El Paso, on the first Monday, being the second day, of April, A. D. 1894, to answer the petition and complaint of A. F. Shapleigh, plaintiff, exhibited and filed in said court on the 5th day of March, A. D. 1894, against The City of San Angelo, defendant, numbered on docket of said court No. 180, of which petition you will serve the said — with the accompanying certified copy, and also with a true copy of this writ.

The nature of plaintiff's demand is as follows, to wit: See copy of petition hereto attached and made part hereof.

Herein fail not, but have you then and there, before said court, this writ, with your action thereon showing how you have executed the same.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said court, hereto affixed, at El Paso, this 5th day of March, A. D. 1894, and the 118th year of our Independence.

Issued same day.

D. H. HART,
Clerk of said Court,
[SEAL.] By WARNER A. GIBBS, *Deputy.*

(Endorsement:) Original. No. 180. United States circuit court, western district of Texas, at El Paso. A. F. Shapleigh *vs.* The City of San Angelo. Citation for the City of San Angelo, Tom Green county. Issued 5th day of March, 1894. D. H. Hart, clerk, by Warner A. Gibbs, deputy.

Marshal's Return.

Came to hand this 14th day of March, 1894, and executed on the 19 day of March, 1894, by delivering to the city clerk of San Angelo, in person, a true copy of this writ, and also a certified copy of the petition in this cause accompanying it.

R. C. WARE, *U. S. Marshal,*
By GEO. A. SCARBOROUGH, *Deputy.*

Mileage of marshal	$
Mileage of deputy	42 00
Service	2 00
Total	$44 00

18 *Defendant's Second Amended Original Answer.*

Filed April 2nd, 1895.

In the Circuit Court of the United States for the Western District of Texas, at El Paso.

AUGUSTUS F. SHAPLEIGH *vs.* CITY OF SAN ANGELO. } No. 180. In Law.

Now, in the above styled and numbered cause, comes the defendant, The City of San Angelo, by its attorneys, and, by leave of court first had and obtained, files its second amended original answer herein in the place and stead of its first amended original answer, filed in said cause of October 4, 1894, and for amendment and answer herein says:

That the said defendant excepts to plaintiff's first amended original petition, filed in said cause on March 9, 1895, and says that same is insufficient in law and states no cause of action.

Wherefore said defendant prays the judgment of the court, etc.

STANTON & TURNEY,
Attorneys for Defendant.

And for special exception to the said first amended original petition, filed in said cause on March 9, 1895, the said defendant comes and says that said petition is insufficient in law for the following reasons, to wit:

1st. Because said petition and allegations therein show that this court has no jurisdiction to hear and determine this cause, the amount claimed in said first amended original petition, as shown by said petition and allegations thereof, to be due is only the sum of eighteen hundred dollars.

2nd. Because the said amended petition shows that the corporation which is alleged to have issued the bonds the interest
19 of which is the subject-matter of this suit had been, before the institution of the same, declared null and void by a court of competent jurisdiction, and, as shown by the allegations of said fact, was null and void, and that said corporation as organized in 1889 has therefore ceased to exist and was in fact void, and said petition fails to show or aver that any subsequent corporation has ever assumed the debt sued upon or become liable for the payment of same, or that the requisite number of qualified voters of the city of San Angelo ever at any election voted in favor of or received any property of the old corporation or ever voted to assume or pay for

the debt of the old or defunct corporation of the city of San Angelo, and said petition wholly fails to show that the necessary and proper elections and each of them were held as a prerequisite to any liability of said defendant.

3rd. Because said petition shows that The City of San Angelo, the defendant herein, was at the time it issued said bonds set forth therein without authority to issue same, for the reason that the amount of bonds so issued largely exceeds the constitutional limit allowed upon that part of the territory lived upon and used by the inhabitants thereof and largely exceeds the valuation of its taxable property which is allowed by law to be taxed for such purposes.

4th. Because said amended petition shows that the territory included in the corporation of 1889 was entirely different from that embraced in the new incorporation of 1892 and which is covered by the defendant in this suit and fails to state any facts which would make said last incorporation liable for said bonds and interest or the debts of the old and first incorporation mentioned therein.

5th. Because said amended petition fails to allege that the proceeds derived from the sale of said bonds and mentioned therein were invested in any permanent improvements which were appropriated and used by the present city government, or that such improvements are or could be of value to the present incorporation, or that said city has promised or bound itself in any manner to assume and pay therefor.

6th. Because said amended petition shows that the debt sued upon and set forth in the second count of said amended petition is not yet due, and that same will not mature until the year 1909, and that the claim thereon is colorable.

7th. Because said amended petition shows that if plaintiff has any claim against the present incorporation of the city of San Angelo that same is not upon the bonds and coupons sued upon, but upon an open claim or account against said city, and defendant says that if plaintiff ever at any time had any claim or demand against it by reason of the incorporation of said city or otherwise, that then said petition shows same to have matured more than two years prior to the commencement of this suit and is therefore barred by the statute of limitation.

8th. Because said petition shows that there is a misjoinder of causes of action attempted in this suit, in this, that the said first count declares upon interest due on bonds of the city of San Angelo, which is an action at law, while the second count of said petition is a claim for money had and received in the sum of ten thousand dollars, which is an equitable action as against this defendant, and as same accrued more than two years prior to the filing of this suit the same is thereby barred by the statute of limitation of two years.

9th. Because said amended petition and all counts and allegations thereof are in fact a suit or claim of an equitable nature and therefore cannot be properly prosecuted upon the law side of this court.

Wherefore said defendant prays the judgment of the court upon

the foregoing exceptions and each and all of them as to the sufficiency of said petitions, etc.

STANTON & TURNEY,
Attorneys for Defendant.

And for further answer in this behalf the said defendant comes, by its attorneys, and denies all and singular the allegations in said amended petition of plaintiff contained, and of this it puts itself upon the country.

Wherefore said defendant prays the judgment of the court that it go hence without day and recover of and from the said plaintiff all costs by defendant in this behalf expended.

STANTON & TURNEY,
Attorneys for Defendant.

21 And the said defendant, for further answer to plaintiff's said amended petition, comes, by its attorneys, and says that the writings obligatory mentioned in said petition, to wit, the said bonds and coupons sued upon, were not executed by it, the said defendant, nor by any person authorized to execute the same for said defendant, and therefore said defendant says that said writings obligatory, bonds and coupons, are not its act and deed, nor any or either of them, and of this said defendant puts itself upon the country.

Wherefore said defendant prays the judgment of the court that it go hence without day and recover of and from said plaintiffs its costs in this behalf expended.

STANTON & TURNEY,
Attorneys for Defendant.

THE STATE OF TEXAS, }
County of El Paso. }

Before me, the undersigned authority, on this day personally appeared M. W. Stanton, affiant, who, being by me duly sworn, deposes and says that he is one of the attorneys of record for the defendant in the foregoing styled and numbered cause, and that the foregoing plea of *non est factum* and matters therein stated are true in fact.

M. W. STANTON.

Sworn to and subscribed before me this the 2nd day of April, 1895.

[SEAL.] D. H. HART,
Clerk U. S. Courts.

And the said defendant, if required to make further answer, for special plea in this behalf, comes, by its attorneys, and says and represents to the court:

1st. That if it be true that there were ever at any time any bonds issued by the city of San Angelo, acting as a corporation (which this defendant does not admit, but here expressly denies) or otherwise, that said incorporation of said city of San Angelo was at the

time of the issuance of said bonds and coupons thereto attached unauthorized, null, and void for the reason that said incorporation attempted to have been made in the year 1889 included or attempted to include a large area of territory within its proposed limits
22 and bounds that was entirely rural and outside of and beyond what was then and now is the actual limits and bounds of the said City of San Angelo, defendant herein, and which aforesaid territory, being without houses or other habitations, and being at said time and now unimproved pasture lands, and which said unimproved lands and uninhabited portions so attempted to be included in said incorporation did not and could not at any time receive any benefit of any character from such proposed issuance of bonds sued upon, and said territory so situated was and is now beyond the limits and bounds of the said inhabited portion of said city of San Angelo, where the people thereof in fact did and now live, and therefore received no protection of any character from said incorporation and no benefits from same; and said defendant further avers that if any improvements of any character were ever made (which this defendant does not admit, but here expressly denies), that said rural territory derived and could derive no benefit from said improvements, and that said territory outside of said unimproved portion of said town was nothing more or less than open and unimproved country, such as exists in many portions of the county of Tom Green, where said city is situated, and was wholly outside of said portion of said territory which was actually inhabited; and defendant says that that portion of the said city of San Angelo which was really inhabited by the people and residents thereof and actually lived upon by the inhabitants of said city covered only an area of seventeen hundred (1,700) acres of land, as shown by the description and boundaries set out in plaintiff's petition, while the entire area embraced in the proposed attempted incorporation of 1889, under which said bonds purported to have been issued, covered an area of about seven thousand five hundred and forty-three (7,543) acres of land, as shown by the boundaries set out in plaintiff's petition, and the greater part of said entire area and the owners thereof were not in anywise benefitted by the issuance and sale of said bonds or by the improvements of the streets and alleys of the said city of San Angelo, as set forth in plaintiff's petition, and for which reason the said bonds sued upon, and also coupons thereto attached, were unauthorized, illegal, null, and void.

2nd. That said defendant further states and shows the court that the said bonds sued upon have never been ratified, nor has
23 payment thereof been in any manner assumed by the said defendant, nor have the ratifying voters, property-owners, and tax-payers within the limits of said defendant corporation by a vote of a majority of same at any election held for the purpose of voting to assume the issuance of said prior bonds sued upon, nor has defendant ever at any time received any benefit from any improvements made or attempted to have been made by the sale of any bonds, as claimed in said petition; and defendant further says that it has never received from the defunct corporation of 1889 any

property, benefit, or anything of value accruing from the sale of any bonds; neither has it received any improvements made from the money derived from any of the bonds sued upon, from said defunct corporation or otherwise.

3rd. That said defendant further avers and denies that any such elections as required by the laws of the State of Texas were ever held by The City of San Angelo, defendant herein, which would be and are prerequisite to any claim or charge by reason of the existence or issuance of the bonds sued upon.

Wherefore said defendant prays the judgment of the court that it go hence without day and recover all costs in this behalf expended.

STANTON & TURNEY,
Attorneys for Defendant.

And this said defendant, for further answer, comes, by its attorneys, and says that if any claim or debt in plaintiff ever existed against this defendant for interest *that* by reason of the matters and things set forth in the said amended petition of plaintiff, that such claim and demand accrued more than two years prior to the filing of plaintiff's petition, and that therefore said claim, if any, is barred by the statute of limitation of two years; and all of which defendant is ready to verify.

Wherefore said defendant prays the judgment of the court that it go hence without day and recover of and from the plaintiff all costs by it in this behalf expended.

STANTON & TURNEY,
Attorneys for Defendant

(Endorsement:) No. 180. In the U. S. circuit court for the western dist. of Texas. Augustus F. Shapleigh, pl'ff, *vs.* The City of San Angelo, def't. Defendant's second amended original answer. Filed April 2, 1895. D. H. Hart, clerk.

24 *Plaintiff's 1st Supplemental Petition.*

Filed April 3, 1895.

AUGUSTUS F. SHAPLEIGH *vs.* THE CITY OF SAN ANGELO. } Suit Pending in the United States Circuit Court for the Western District of Texas.

Comes now the plaintiff in the above-entitled suit, by his attorneys, and with the leave of the court files his first supplemental petition, and for replication to the second amended original answer filed by said defendant April 2, 1895, plaintiff says:

1. That he denies all and singular the allegations in said answer contained.

2. That said defendant by its said second amended answer and by its acts is attempting to violate the Constitution of the United States by impairing the obligation of its contract and the contract

made by said city of San Angelo, as set forth in plaintiff's said first amended original petition, when it issued and sold said bonds; that said bonds were legally issued and sold by said former corporation, and defendant corporation by its acts and by the acts of the legal voters within its limits has assumed the payment of said bonds and the interest thereon.

Wherefore plaintiff prays as in his first amended original petition.

T. K. SKINKER &
W. B. MERCHANT,
Att'ys for Plaintiff.

(Endorsement:) No. 180. Augustus F. Shapleigh *vs.* The City of San Angelo. Plaintiff's first supplemental petition. Filed April 3, '95. D. H. Hart, clerk, by J. P. Hodgson, deputy.

Defendant's 1st Supplemental Answer.

Filed April 3, 1895.

25 In the U. S. Circuit Court for the Western District of Texas, at El Paso.

AUGUSTUS F. SHAPLEIGH, Pl'ff,
vs.
THE CITY OF SAN ANGELO, Def't. } No. 180. In Law.

Now comes The City of San Angelo, defendant, and for answer to the first supplemental petition of plaintiff, filed in said cause on April 3rd, 1895, says and represents—

That said defendant excepts to the said supplemental petition and says that same is insufficient in law and shows no cause of action and presents no defence to the matters set up in the 2nd amended answer of defendant.

Wherefore said defendant prays the judgment of the court, etc.

STANTON & TURNEY,
Att'ys for said Def't.

And for further answer to the matters and things contained in said supplemental petition said defendant comes, by its attorneys, and denies all and singular the allegations in the said supplemental petition contained, and of this said defendant puts itself upon the country.

Wherefore said def't prays the judgment of the court, etc.

STANTON & TURNEY,
Att'ys for Def't.

(Endorsement:) No. 180. In the U. S. circuit court for western dist. of Texas, at El Paso. Augustus F. Shapleigh *vs.* The City of San Angelo, def't. 1st supplemental answer of defendant. Filed Ap'l 3, '95. D. H. Hart, clerk, by J. P. Hodgson, deputy.

Judgment.

Entered April 5th, 1895.

AUGUSTUS F SHAPLEIGH, Plaintiff,
vs.
THE CITY OF SAN ANGELO, Defendant. } No. 180.

EL PASO, TEXAS, *April 5th*, 1895.

26 Be it remembered that on this the 5th day of April, 1895, came on to be heard the above styled and numbered cause, and in open court came plaintiff, by his attorneys, and announced ready for trial, and likewise came defendant and announced ready on the matters of law, and thereupon came on to be heard the exceptions, both general and special, as set forth in the second amended answer of defendant, filed in said cause on April 2, 1895, and urged to the first amended original petition of plaintiff, filed in said cause on March 9, 1895, and the court having heard the said petition and exceptions read and argument of attorneys thereon and being now fully advised in the premises, the said court is of the opinion that the special exceptions set forth in said answer, numbers 1st, 3rd, 5th, 6th, 7th, 8th, and 9th, should be overruled, and that the general exception and special exceptions numbers 2nd and 4th, as set forth in said answer, should be sustained; and it is therefore considered, ordered, and adjudged by the court that said special exceptions numbers 1st, 3rd, 5th, 6th, 7th, 8th, and 9th be, and the same are hereby, in all things overruled, and to which said action and judgment of the court the said defendant in open court excepted; and it is further considered, ordered, and adjudged by the court that the said general exception, and that said special exceptions numbers 2nd and 4th be, and the same are hereby, sustained, and to which order and judgment of the court sustaining said exceptions the said plaintiff in open court excepted; and the said plaintiff not desiring to amend, but having elected to abide by his said pleading, it is therefore further considered, ordered, and adjudged by the court that the said cause be dismissed and the plaintiff, Augustus F. Shapleigh, take nothing by this suit, and that said defendant, The City of San Angelo, go hence without day and recover of and from plaintiff all costs by said defendant in this behalf expended, for which let execution issue; and it is in all things so ordered, adjudged, and decreed by the court.

27 Defendant's *Bill of Exceptions.*

Filed April 6th, 1895.

AUGUSTUS F. SHAPLEIGH, Plaintiff,
vs.
THE CITY OF SAN ANGELO, Defendant. } No. 180.

Be it remembered that on the trial of the above-entitled cause the defendant, to sustain the issues on its part, among other things read

statute and constitution of Texas in reference to municipal corporations, and also read chapter 77 of the General Laws of the State of Texas of the 22nd legislature, approved April 13, 1891, an act to be entitled An act to amend article 541, chapter 11, title 17, of the Revised Civil Statutes of the State of Texas, and also read the opinion of the supreme court of the State of Texas in the case of White against The City of Quanah, as reported in the publication known as the Southwestern Reporter, in volume 28, at pages 1065, 1066 of said publication; but the plaintiff objected to said chapter 77 and the said opinion and denied the validity of said chapter as being an act passed by said State impairing the obligation of the contracts set out in plaintiff's petition, in violation of section 10 of article 1 of the Constitution of the U. S.

And the court having sustained the defendant's special exceptions Nos. 2 and 4 to the plaintiff's petition, and having entered judgment for the defendant, plaintiff excepted to the action and ruling of the court for the reason, among others, that the said chapter was an act passed by said State impairing the obligation of the contracts set out in plaintiff's petition, in violation of section 10 of article 1 of the Constitution of the United States.

And, to the end that said objection and exception may be preserved and made a part of the record, the plaintiff prays that this certificate may be allowed and signed, which is accordingly done this 6th day of April, 1895.

T. S. MAXEY, *Judge.*

(Endorsement:) No. 180. Augustus F. Shapleigh *vs.* The City of San Angelo. *Defendant's* bill of exceptions. Filed Ap'l 6, 1895. D. H. Hart, clerk.

28 *Assignment of Errors and Petition for Writ of Error.*

Filed May 2nd, 1895.

AUGUSTUS F. SHAPLEIGH, Pl'ff,
vs.
THE CITY OF SAN ANGELO, Def't.

The plaintiff comes and prays a writ of error to the Supreme Court of the United States, and says that manifest error hath happened, to the great damage of the plaintiff, in the proceedings and judgment in this case, to wit:

First. That the court erred in sustaining the demurrer to the petition.

Second. That the court erred in holding that I. G. Preusser and John F. Moorkens were not respectively *de facto* mayor and *de facto* secretary of the city of San Angelo as the same was organized when the plaintiff's bonds and coupons were issued.

Third. That the court erred in refusing to hold that the defendant, the present City of San Angelo, is the successor in law of the

city of San Angelo as the same was organized when the plaintiff's bonds and coupons were issued, and as such bound to pay the said bonds and coupons.

Fourth. That the court erred in refusing to hold that the act of the 22d legislature of the State of Texas, entitled "An act to amend article 541, chapter 11, title 17, of the Revised Civil Statutes of the State of Texas" (being chapter 77), approved April 13th, 1891, is no bar to plaintiff's recovery in this case.

Fifth. That the court erred in refusing to hold that the said act of the Texas legislature, as construed by the supreme court of the State of Texas in the case of White *vs.* The City of Quanah, in an opinion published in a publication known as the Southwestern Reporter, in volume 28, at page 1065, is in conflict with section 10 of article 1 of the Constitution of the United States and impairs the obligation of the contracts sued on by plaintiff in this case.

Sixth. That the court erred in giving judgment for the defendant.

T. K. SKINKER,
Attorney for Plaintiff.

(Endorsement:) No. 180. Augustus F. Shapleigh *vs.* The City of San Angelo. Petition for writ of error and assignment of errors. Filed May 2, 1895. D. H. Hart, clerk.

29 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Augustus F. Shapleigh, plaintiff, and The City of San Angelo, defendant, at the April term, 1895, of said court, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., within thirty days from the date hereof, in the said Supreme Court of the United States, to be then and there held, *and*, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 6th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio. }

D. H. HART,
Clerk of the U. S. Circuit Court for the Western District of Texas.

Allowed this the 6th day of May, A. D. 1895.
T. S. MAXEY,
United States Judge.

[Endorsed:] No. 180. Augustus F. Shapleigh *vs.* The City of San Angelo. Writ of error. Filed May 6, 1895. D. H. Hart, clerk. (10.) S. C.

30 *Bond in Error.*

Filed May 6, 1895.

Know all men by these presents that we, Augustus F. Shapleigh, as principal, and Alfred L. Shapleigh, as sureties, are held and firmly bound unto the City of San Angelo in the full and just sum of five hundred dollars, to be paid to the said The City of San Angelo or its assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of April, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a circuit court of the United States in and for the western district of Texas, in a suit depending in said court, between Augustus F. Shapleigh, plaintiff, and The City of San Angelo, defendant, a judgment was rendered against the said plaintiff and in favor of the said defendant, and the said plaintiff having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing said defendant to be and appear before the Supreme Court of the United States, to be holden at Washington, D. C., within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Augustus F. Shapleigh shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

AUGUSTUS F. SHAPLEIGH. [SEAL.]
ALFRED L. SHAPLEIGH. [SEAL.]

Sealed and delivered in presence of—

THAD. C. HARRIS.

Approved this the 6th day of May, A. D. 1895.

T. S. MAXEY,
United States Judge.

(Endorsement:) No. 180. Augustus F. Shapleigh *vs.* The City of San Angelo. Bond. Filed May 6, 1895. D. H. Hart, clerk.

31 THE UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The President of the United States to the City of San Angelo, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, D. C., within thirty days from and after the date hereof, pursuant to writ of error sued out and filed in the clerk's office of the circuit court of the United States for the western district of Texas, in the cause wherein Augustus F. Shapleigh is plaintiff and you, the said City of San Angelo, are defendant, to show cause, if any there be, why the judgment rendered against the said Augustus F. Shapleigh, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Signed this the 6th day of May, A. D. 1895.

T. S. MAXEY.
United States Judge.

Attest:

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio. }

D. H. HART, *Clerk.*

31½ [Endorsed:] No. 180. Augustus F. Shapleigh *vs.* The City of San Angelo. Original citation. Filed May 10, 1895. D. H. Hart, clerk. S. C.

The City of San Angelo hereby acknowledges service of the within citation.

STANTON & TURNEY,
Attorneys for the said City.

32 THE UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the circuit court of the United States for the western district of Texas, do hereby certify that the foregoing thirty (30) pages, including No. 17*a*, contain a true and correct copy of the proceedings had in cause No. 180, Augustus F. Shapleigh *vs.* The City of San Angelo, as the same appear on file and of record in

my office; and I further certify that pages Nos. 29 and 31 are the original writ of error and citation in error respectively, with acceptance of service endorsed on the last named.

Witness my hand and the seal of said court, at office, in the city of El Paso, this the 11th day of May, A. D. 1895.

[The Seal of the U. S. Circuit Court, Western Dist. Texas.]

D. H. HART,
Clerk Circuit Court U. S., West. Dist. of Tex.

Endorsed on cover: Case No. 15,929. W. Texas C. C. U. S. Term No., 287. Augustus F. Shapleigh, plaintiff in error, *vs.* The City of San Angelo. Filed June 3rd, 1895.

167-646

IN THE

Supreme Court of the United States.

Office Supreme Court, U. S.
FILED.
APR 3 1897
JAMES H. McKENNEY,
CLERK

OCTOBER TERM, 1896.

AUGUSTUS F. SHAPLEIGH,
Plaintiff in Error,

vs.

THE CITY OF SAN ANGELO,
Defendant in Error.

No. 287.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

T. K. SKINKER,
Attorney for the Plaintiff in Error.

W. J. KESL, 324 OLIVE ST.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

AUGUSTUS F. SHAPLEIGH,
Plaintiff in Error,
vs.
THE CITY OF SAN ANGELO,
Defendant in Error.

No. 287.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

STATEMENT.

The amended original petition in this case is in two counts. The first declares upon sixty coupons detached from bonds of the defendant city issued for street improvement purposes. The second, assuming that the bonds might for some reason be held invalid, seeks to recover the consideration paid for them, to-wit, the sum of $10,000. There is an answer, styled a second amended original answer, combining one general and nine special exceptions (in the nature of demurrers) with other matters of defense raising questions of fact. The court

considered only the questions of law raised by the exceptions and sustained the general and two of the special exceptions. The plaintiff electing to stand upon his petition, judgment was entered for defendant and plaintiff sued out this writ of error.

The Petition.

The amended original petition is as follows:

First. Augustus F. Shapleigh, plaintiff, complaining of the City of San Angelo, defendant, represents that the plaintiff is a citizen of the State of Missouri and the defendant a city of the State of Texas, duly incorporated under the laws of said State, and as such a citizen of said State and of the western district thereof.

Second. That heretofore, to-wit, on the 18th day of January, 1889, the county judge of the County of Tom Green, in said State of Texas, made an entry upon the records of the commissioner's court of said county setting forth that the inhabitants of the Town of San Angelo, in said county, were then and there incorporated as a city within the following limits and bounds, to-wit: (Here follows a particular description, by metes and bounds of the territory included within the corporate limits. It is unnecessary to set it out.)

Third. That on the 18th day of January, 1889, said city contained more than 1000 inhabitants; that immediately thereafter an election was held in said city, pursuant to an order of the said county judge, at which election a mayor, a marshal, and five aldermen were elected, who thereupon organized a government for said city and entered upon the performance of their duties as such officers; that from that time forward said city and the inhabitants thereof conducted a city government, held elections, enacted and enforced ordinances, made con-

tracts, created and paid debts and salaries, levied and collected taxes, created public city improvements, and in every way performed the functions of a city.

Fourth That thereafter, to-wit, on the 16th day of May, 1889, the city council of said city passed an ordinance entitled "An ordinance authorizing the issuing of bonds for the purpose of improving the streets and public highways in the City of San Angelo and to provide for the interest and create a sinking fund for the principal of said bonds" wherein and whereby it was ordained that the mayor and secretary of the city be, and they were, authorized to excute under the corporate seal of the city and to negotiate coupon bonds of the denomination of $1,000 each, and that for the payment of the interest on said bonds and to create a sinking fund for the redemption of the same there should be levied and collected an annual *ad valorem* tax on all property within said city at the rate of 25 cents on the $100 of valuation.

Plaintiff states that in pursurance of said ordinance the said mayor signed and said secretary countersigned and the mayor negotiated and sold ten certain bonds, sealed with the corporate seal of said city, numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in words and figures following to-wit:

UNITED STATES OF AMERICA,
STATE OF TEXAS, CITY OF SAN ANGELO.

No. 4. *City Improvement Bond.* $1000

Know all men by these presents, that the City of San Angelo, in the County of Tom Green, State of Texas, for value received, hereby promises to pay to bearer on the 1st day of January, 1909, $1000, lawful money of the United States of America, with interest thereon at the rate of six per cent. per annum from date

hereof, payable semi-annually on the first days of November and May in each year upon the presentation and surrender of the coupons hereto attached as they may fall due, the principal and interest of this bond payable at the Hanover National Bank in the City of New York.

This bond is one of a series of twenty bonds of like tenor and date, of the denomination of $1000 each, issued by said City of San Angelo, under authority of Art. 420 to 424, Chapter 4, Revised Statutes of Texas, as amended by Chapter 55 of the Twentieth Legislature of said State, approved March 23, 1887, and of city ordinance in conformity thereto, approved May 16, 1889, and is issued for the purpose of street improvement for said city. To secure the payment of the interest and principal of said bonds a tax levy of twenty-five cents on each $100 has been made, and a sufficient amount from any other revenue of the city to make up for any possible deficiency is provided for by ordinance.

In testimony whereof, the said city by its council has caused this bond to be signed by the mayor of the city and attested by the city secretary, with the city seal attached, this 1st day of May, A. D. 1889.

J. G. Preusser,

[seal] *Mayor.*

Attest: John F. Moorkens,

City Secretary.

Fifth. That attached to each of said bonds there were forty coupons, each for the sum of $30, and representing one semi-annual installment of interest on said bond, maturing respectively on the first days of May and November in each year; that one of said coupons is in words and figures following:

$30 *Coupon.* $30

The City of San Angelo, Tom Green County, Texas, will pay bearer $30 on May 1st, 1892, at the Hanover National Bank, in the City of New York, being interest due at that date on street improvement bond No. 4, for $1000, of date May 1, 1889.

JOHN F. MOORKENS,
City Secretary.

Sixth. That all the other coupons are the same in tenor and effect, except as to the date of maturity and the number of bond to which they are severally attached.

Seventh. That before said bonds were issued the said mayor forwarded the same to the comptroller of public accounts of the State of Texas, who thereupon registered the same in a book kept for that purpose in his office, and endorsed on each of said bonds his certificate that the same was so registered. Plaintiff states that at the time said bonds were so issued the assessed value of the property in said city amounted to $1,500,000, and that said bonds were issued and their proceeds were used for the purpose of making and building streets in said city.

Eighth. That heretofore, to-wit, at the fall term, 1890, of the District Court of Tom Green County, in said State, one T. C. Winn, then the county attorney of said county, at the instance of one D. D. Wallace, a citizen and tax-payer of said town of San Angelo, by leave of said court, filed an information against J. G. Preusser, W. S. Veck, Marion Robertson, Joseph Tweedy, W. S. Kelley, and J. S. Shupert, wherein it was alleged that said Preusser, Veck, Robertson, Tweedy, Kelley, and Shupert were exercising and performing the duties, privileges, and functions of a mayor and city council of said City of San Angelo, claiming the same to be a city duly

and legally incorporated by virtue of Chapter 11, Title 17, Revised Statutes of said State, whereas in truth and in fact, as it was alleged, said city was never legally incorporated and said defendants were unlawfully performing and exercising the said functions; and the said information prayed that the said defendants be cited to appear and show cause, if any they had, why they should not be ousted from office, and that said incorporation be declared null and void; that thereupon such proceedings were had in said case that on the 15th day of December, 1891, the said District Court entered a decree ousting the said defendants from their said offices and adjudging that the incorporation of the said town of San Angelo be, and the same was, abolished and delared to be null and void.

Ninth. That on the 10th day of February, 1892, in pursuance of a vote of a majority of the legal voters, tax-paying property-holders residing within the limits hereinafter described, the county judge of said county made an entry upon the records of the commissioner's court of said county, a copy of which is hereto annexed, marked Exhibit A, setting forth that the inhabitants of the City of San Angelo, defendant herein, were then and there incorporated as a city within the following limits and bounds, to-wit: (Here follows a particular description by metes and bounds of the territory included within the corporate limits. It is unnecessary to set it out.)

Tenth. That the territory embraced within the limits last above described in paragraph 9 is all embraced within the limits first above described in paragraph 2, and includes all the lands within said first-described limits actually occupied and inhabited as a town, and includes all the streets and improvements created or acquired by said city, as first organized in 1889, with the proceeds of said bonds, as above stated, and all the public buildings and property thereof, and that said city and the inhabitants thereof are now and long have been daily using said streets, improve-

ments, buildings and property; which street improvements and buildings were paid for with the proceeds of said bonds.

Eleventh. That he is the bearer and owner of sixty of the coupons attached to the above-described bonds, to-wit: those which matured on the 1st day of May, 1892; those which matured on the 1st day of November, 1892; those which matured on the 1st day of May, 1893; those which matured on the 1st day of November, 1893; those which matured on the 1st day of May, 1894, and those which matured on the 1st day of November, 1894, and that all said coupons are unpaid.

Twelfth. That defendant, by reason of the premises; became liable and promised plaintiff to pay him the sums of money in said coupons specified, according to the tenor and effect thereof; that $1800 of said sum of money is now due, and defendant, though often requested, has refused and still refuses to day the same or any part thereof, to plaintiff's damage, $1800.

Thirteenth. Wherefore plaintiff prays judgment against defendant for the sum of $1800, with interest on each of said coupons from the maturity thereof at the rate of six per cent. per annum, and for his costs and for general relief.

Fourteenth. For another and further cause of action the plaintiff states that heretofore, to-wit: on the 18th day of January, 1889, the county judge of the County of Tom Green, in said State, made an entry upon the records of the commissioner's court of said county, setting forth that the inhabitants of the town of San Angelo, in said county, were then and there incorporated as a city within the following limits and bounds, to-wit: (Here follows a particular description, by metes and bounds, of the territory included within the corporate limits, being the same described in the second subdivision, *supra.*)

Fifteenth. That on the 18th day of January, 1889, said city contained more than 1000 inhabitants; that immediately thereafter an election was held in said city pursuant to an order of the said county judge, at which election a mayor, a marshal and five aldermen were elected, who thereupon organized a government for said city and entered upon the performance of their duties as such officers; that from that time forward said city and the inhabitants thereof conducted a city government, held elections, enacted and enforced ordinances, made contracts, created and paid debts and salaries, levied and collected taxes, created public improvements, and in every way performed the functions of a city.

Sixteenth. That thereafter, to-wit, on the 16th day of May, 1889, the city council of said city passed an ordinance entitled "An ordinance authorizing the issuing of bonds for the purpose of improving the streets and public highways in the City of San Angelo, and to provide for the interest and create a sinking fund for the principal of said bonds," wherein and whereby it was ordained that the mayor and secretary of the city be, and they were authorized to execute under the corporate seal of the city and to negotiate coupon bonds of the denomination of $1000 each, and that for the payment of the interest on said bonds and to create a sinking fund for the redemption of the same there should be levied and collected an annual *ad valorem* tax on all property within said city at the rate of twenty-five cents on the $100 of valuation.

Seventeenth. That in pursuance of said ordinance the said mayor signed and said secretary countersigned and the mayor negotiated and sold ten certain bonds, sealed with the corporate seal of said city, numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, in words and figures following, to-wit: (Here the bond is set out in words and figures, the same as in the fourth paragraph, *supra*.)

Eighteenth. That before said bonds were issued, the said mayor forwarded the same to the comptroller of of public accounts of the State of Texas, who thereupon registered the same in a book kept for that purpose in his office, and endorsed on each of said bonds his certificate that the same was so registered. Plaintiff states that at the time said bonds were so issued, the assessed value of the property in said city amounted to $1,500,000, and that said bonds were issued and their proceeds were used for the purpose of making and building streets in said city.

Nineteenth. That heretofore, to-wit, at the fall term of 1890, of the District Court of Tom Green County, in said State, one T. C. Winn, then the county attorney of said county, at the instance of one D. D. Wallace, a citizen and tax-payer of said town of San Angelo, by leave of said court, filed an information against J. G. Preusser, W. S. Veck, Marion Robertson, Joseph Tweedy, W. S. Kelley, and J. S. Shupert, wherein it was alleged that said Preusser, Veck, Robertson, Tweedy, Kelley, and Shupert were exercising and performing the duties, privileges, and functions of a mayor and city council of said city of San Angelo, claiming the same to be a city duly and legally incorporated, by virtue of Chapter 11, Title 17, Revised Statutes of said State, whereas, in truth and in fact, as it was alleged, said city was never legally incorporated, and said defendants were unlawfully performing and exercising the said functions; and the said information prayed that the said defendants be cited to appear and show cause, if any they had, why they should not be ousted from office, and that said incorporation be declared null and void. Plaintiff states thereupon such proceedings were had in said case, that on the 15th day of December, 1891, the said District Court entered a decree ousting the said defendants from their said offices and adjudging that the incorporation of said town of San

Angelo be, and the same was, abolished and declared null and void.

Twentieth. That on the 10th day of February, 1892, in pursuance of a vote of a majority of the legal voters tax-paying property-holders residing within the limits hereafter described, the county judge of said county made an entry upon the records of the commissioners' court of said county, a copy of which is hereto annexed, marked Exhibit A, setting forth that the inhabitants of the City of San Angelo, defendant herein, were then and there incorporated as a city within the following limits and bounds, to-wit: (Here follows a particular description by metes and bounds, of the territory included within the corporate limits, being the same as in the ninth paragraph *supra.*)

Twenty-first. That the territory embraced within the limits last above described in paragraph 20 is all embraced within the limits first above described in paragraph 14, and includes all the lands within said first described limits in paragraph 14 actually occupied and inhabited as a town, and includes all the streets and improvements created or acquired by said city as first organized with the proceeds of said bonds, as above stated, and all the public buildings and property thereof, and that said city and the inhabitants thereof are now and long have been daily using said streets, improvements, and buildings and property.

Twenty-second. That prior to the 15th day of December, 1891, the City of San Angelo, as first organized in 1889, sold and delivered the ten bonds hereinabove described to August J. Weil and the Donaldson Bond & Stock Co., both of the City St. Louis, in the State of Missouri, for the consideration of $10,000 in money, then paid to said city; that the proceeds of said sale was the money used by said city in making and building its streets as aforesaid; that thereafter said Weil and said Donaldson Bond & Stock Co., for valuable consideration, sold

part of said bonds to this plaintiff and the remainder to one Henry C. Clarke and one John D. Hibbeler, from whom the plaintiff subsequently purchased the same, so that plaintiff is now the owner of all said bonds and of the entire claim against the defendant as for money had and received to the plaintiff's use.

Wherefore the plaintiff prays judgment against defendant for the sum of $10,000 with interest, and costs.

Exhibit A annexed to the petition and made a part thereof by reference in the twentieth paragraph *supra* is as follows:

Whereas heretofore, to-wit: on the 8th day of January, 1892, sixty qualified voters of the town of San Angelo, in Tom Green County, Texas, presented to me their petition praying for an election submitting to the voters of said town the question of incorporating said town within the limits hereinafter described by field-notes;

And whereas, by virtue of the authority by law vested in me, I, W. D. Cochran, judge of said county, did, on the 19th day of January, 1892, order an election to be held upon the 9th day of February, 1892, to determine whether or not the said City of San Angelo shall be incorporated within the following described limits, and said election having been held in accordance with law upon the 9th day of February, 1892, and it appearing to me by the returns of the officers who held said election, made to me, that a majority of the votes cast at said election were for incorporation, to-wit: the total number of votes polled being 530—corporation, 449; no corporation, 70; against corporation 6, for corporation 3; illegal, 2—I hereby declare that the inhabitants of said City of San Angelo, in Tom Green County, Texas, are incorporated as a city within the following limits and bounds, to-wit: (Here follows a particular description by metes and bounds, of the territory included within the corporation limits, being the same as in the twentieth subdivision *supra*), the said

town to be known as and incorporated under the name of the "City of San Angelo." Given under my hand and official signature this 10th day of February, A. D. 1892.

W. D. COCHRAN,

County Judge, Tom Green County, Texas.

THE ANSWER.

The second amended original answer, or so much of it as requires to be considered, is as follows:

The defendant the City of San Angelo, for answer herein says:

That the said defendant excepts to plaintiff's first amended original petition, filed in said cause on March 9, 1895, and says that same is insufficient in law and states no cause of action.

And for special exception to the said first amended original petition, filed in said cause on March 9, 1895, the said defendant comes and says that said petition is insufficient in law for the following reasons, to-wit:

Second. Because the said amended petition shows that the corporation which is alleged to have issued the bonds the interest of which is the subject-matter of this suit, had been, before the institution of the same, declared null and void by a court of competent jurisdiction, and as shown by the allegations of said fact was null and void, and that said corporation as organized in 1889 has therefore ceased to exist and was in fact void, and said petition fails to show or aver that any subsequent corporation has ever assumed the debt sued upon or become liable for the payment of same, or that the requisite number of qualified voters of the City of San Angelo ever at any election voted in favor of or received any property of the

old corporation or ever voted to assume or pay for the debt of the old or defunct corporation of the City of San Angelo, and said petition wholly fails to show that the necessary and proper elections and each of them were held as a pre-requisite to any liability of said defendant.

Fourth. Because said amended petition shows that the territory included in the corporation of 1889 was entirely different from that embraced in the new incorporation of 1892 and which is covered by the defendant in this suit, and fails to state any facts which would make said last incorporation liable for said bonds and interest or the debts of the old and first incorporation mentioned therein.

Supplemental Petition.

The plaintiff thereupon filed a supplemental petition wherein he says:

Second. That said defendant by its said second amended answer and by its acts is attempting to violate the Constitution of the United States by impairing the obligation of its contract and the contract made by said City of San Angelo, as set forth in plaintiff's said first amended original petition, when it issued and sold said bonds; that said bonds were legally issued and sold by said former corporation, and defendant corporation by its acts and by the acts of the legal voters within its limits has assumed the payment of said bonds and the interest thereon.

Wherefore plaintiff prays, etc.

Supplemental Answer.

Defendant thereupon filed a supplemental answer, wherein he says:

That said defendant excepts to the said supplemental petition and says that same is insufficient in law and shows

no cause of action and presents no defense to the matters set up in the second amended answer of defendant.

All the defendant's exceptions which were determined in favor of the plaintiff, and all his defenses raising issues of fact, have been omitted from the foregoing statement, as being unnecessary to the determination of the questions which can be considered in this court.

The Judgment.

The judgment was as follows:

Be it remembered that on this the 5th day of April, 1895, came on to be heard the above styled a d numbered cause, and in open court came plaintiff, by his attorneys, and announced ready for trial, and likewise came defendant and announced ready on the matters of law, and thereupon came on to be heard the exceptions, both general and special, as set forth in the second amended answer of defendant, filed in said cause on April 2, 1895, and urged to the first amended original petition of plaintiff, filed in said cause on March 9, 1895, and the court having heard the said petition and exceptions read and argument of attorneys thereon and being now fully advised in the premises, the said court is of the opinion that the special exceptions set forth in said answer, numbers 1st, 3rd, 5th, 6th, 7th, 8th, and 9th, should be overruled, and that the general exception and special exeeptions numbers 2nd and 4th, as set forth in said answer, should be sustained; and it is therefore considered, ordered, and adjudged by the court that said special exceptions numbers 1st, 3rd, 5th, 6th, 7th, 8th, and 9th be, and the same are hereby, in all things overruled, and to which said action and judgment of the court the said defendant in open court excepted; and it is further considered, ordered, and adjudged by the court that the said general

exception, and the said special exceptions numbers 2nd, and 4th be, and the same are hereby, sustained, and to which order and judgment of the court sustaining said exceptions the said plaintiff in open court excepted; and the said plaintiff not desiring to amend, but having elected to abide by his said pleading, it is therefore further considered, ordered, and adjudged by the court that the said cause be dismissed and the plaintiff, August F. Shapleigh, take nothing by this suit, and that said defendant the City of San Angelo, go hence without day and recover of and from plaintiff all costs by said defendant in this behalf expended, for which let execution issue; and it is in all things so ordered, adjudged, and decreed by the court.

BILL OF EXCEPTIONS.

Immediately upon the rendition of this judgment the plaintiff presented and the court allowed and signed and caused to be filed a bill of exceptions as follows:

Be it remembered that on the trial of the above entitled cause the defendant, to sustain the issues on its part, among other things read statute and constitution of Texas in reference to municipal corporations, and also read Chapter 77 of the General Laws of the State of Texas of the Twenty-Second Legislature, approved April 13, 1891, an act to be entitled "An Act to amend Article 541, Chapter 11, Title 17, of the Revised Civil Statutes of the State of Texas, and also read the opinion of the Supreme Court of the State of Texas in the case of White against the City of Quanah, as reported in the publication known as the Southwestern Reporter, in volume 28, at pages 1065, 1066 of said publication; but the plaintiff objected to said Chapter 77 and the said opinion and denied the validity of said chapter as being an act passed by said State impairing the obligation of the contracts set

out in plaintiff's petition, in violation of Section 10 of Article 1 of the Constitution of the United States.

And the court having sustained the defendant's special exceptions Nos. 2 and 4 to the plaintiff's petition, and having entered judgment for the defendant, plaintiff excepted to the action and ruling of the court for the reason, among others, that the said chapter was an act passed by said State impairing the obligation of the contracts set out in plaintiff's petition, in violation of Section 10 of Article 1 of the Constitution of the United States.

And, to the end that said objection and exception may be preserved and made a part of the record, the plaintiff prays that this certificate may be allowed and signed, which is accordingly done this 6th day of April, 1895.

In due time the plaintiff also presented and filed a petition for a writ of error and an assignment of errors as follows:

Assignment of Errors.

The plaintiff comes and prays a writ of error to the Supreme Court of the United States, and says that manifest error hath happened, to the great damage of the plaintiff, in the proceedings and judgment in this case, to-wit:

First. That the court erred in sustaining the demurrer to the petition.

Second. That the court erred in holding that J. G. Preusser and John F. Moorkens were not respectively *de facto* mayor and *de facto* secretary of the City of San Angelo, as the same was organized when the plaintiff's bonds and coupons were issued.

Third. That the court erred in refusing to hold that the defendant, the present City of San Angelo, is the successor in law of the City of San Angelo as the same was organized when the plaintiff's bonds and coupons

were issued, and as such bound to pay the said bonds and coupons.

Fourth. That the court erred in refusing to hold that the act of the twenty-second legislature of the State of Texas, entitled "an act to amend, Article 541, Chapter 11, Title 17, of the Revised Civil Statutes of the State of Texas" (being Chapter 77), approved April 13, 1891, is no bar to plaintiff's recovery in this case.

Fifth. That the court erred in refusiug to hold that the said act of the Texas legislature, as construed by the Supreme Court of the State of Texas in the case of White vs. The City of Quanah, in an opinion published in a publication known as the Southwestern Reporter, in volume 28, at page 1065, is in conflict with Section 10 of Article 1 of the Constitution of the United States and impairs the obligation of the contracts sued on by plaintiff in this case.

Sixth. That the court erred in giving judgment for the defendant.

The plaintiff also presented a bond in error, which was approved, the writ of error was allowed, citation was issued and served, and the case is now here for determination.

BRIEF.

I.

The Circuit Court erred in refusing to hold that the defendant, the present City of San Angelo, is the successor in law of the City of Angelo as the same was organized when the plaintiff's bonds and coupons were issued, and as such is bound to pay the said bonds and coupons.

1. The bonds are valid.

I Sayles Civil Statutes of Texas, Arts. 420 to 425.

Texas General Laws, 1887, Chapter 55.

2. At the time the bonds were issued San Angelo was a corporation *de facto*.

I Sayles Civil Statutes, Title 17, Chapter 1, Art. 340; Chap. 11, Arts. 506 to 514, pp. 150, 193.

The State vs. Eidson, 76 Texas, 302.

Ewing vs. The State, 81 Texas, 172.

School District vs. The State, 29 Kansas, 57, 63.

Methodist Episcopal Church vs. Pickett, 19 N. Y., 482, 485.

General Laws, 1891, Chap. 77, p. 95.

3. Being a *de facto* corporation the original city could make valid and enforcible contracts.

Harper County vs. Rose, 140 U. S., 71.

2 Morawetz on Corporations, Secs. 746, 750.

Douglass County vs. Bolles, 94 U. S., 104.

Leavenworth County vs. Barnes, 94 U. S., 70.

County vs. Shores, 97 U. S., 277.

American Salt Co. vs. Heidenheimer, 80 Texas, 344.

Cowell vs. Springs Company, 100 U. S., 55, 60.

Camp vs. Byrne, 41 Mo., 525.

Finch vs. Ullman, 105 Mo., 255.

Zearfoss vs. Philadelphia, 154 Pa., 449.

Broughton vs. Pensacola, 93 U. S., 269.

Mount Pleasant vs. Beckwith, 100 U. S., 514, 529.

4. Being a *de facto* corporation the original city was subject to suit on these bonds, and could not have pleaded the illegality of her own organization.

Franklin Savings Institution vs. Board of Education, 75 Mo., 408.

Ashley vs. Board of Supervisors, 8 U. S., C. C. A., 455, 461; 16 U. S. App., 656, 668.

Coler vs. Dwight School Township, 3 N. Dak., 249, 257.

Stockle vs. Silsbee, 41 Mich., 615.

Aller vs. Town of Cameron, 3 Dillon, 198; per Dillon, J.

Mendenhall vs. Burton, 42 Kans., 570.

Town of Enterprise vs. State, 29 Fla., 128.

Austrian vs. Guy, 21 Fed., 500.

City of St. Louis vs. Shields, 62 Mo., 247.

Graham vs. City of Greenville, 67 Tex., 62.

Brennan vs. Bradshaw, 53 Tex., 330.

Eustis vs. City of Henrietta, (Texas Civil Appeals), 37 S. W. Rep., 632.

McCrary vs. City of Comanche, 34 S. W. Rep., 679.

Troutman vs. McCleskey, 27 S. W. Rep., 173.

5. The present city has succeeded to the liability of the former.

Broughton vs. Pensacola, 93 U. S. 266.

Mount Pleasant vs. Beckwith, 100 U. S., 514.

Mobile vs. Watson, 116 U. S., 289.

Riley vs. Garfield Township, 54 Kansas, 463.

The School District vs. The State, 29 Kans., 57.

Ruohs vs. Athens, 91 Tenn., 20.

Hill vs. Kahoka, 35 Fed., 32.

Brewis vs. Duluth, 13 Fed., 334.

Laird vs. DeSoto, 22 Fed., 421.

Deveraux vs. Brownsville, 29 Fed., 742.

O'Connor vs. Memphis, 6 Lea, 730.

Amy vs. Selma, 77 Ala., 103.

Schriber vs. Langlade, 66 Wis., 629.

People vs. Board of Supervisors, 94 N. Y., 263,

Ross vs. Wimberly, 60 Miss., 345.

1 Dillon on Municipal Corporations (4 Ed) Secs. 169-174.

Tiedemann on Municipal Corporations, Secs. 42, 43.

Thompson vs. Abbott, 61 Mo., 176.

Hughes vs. School District, 72 Mo., 643.

(*a*) It is immaterial that the original city may have been only a *de facto* corporation.

Port Gibson vs. Moore, 13 Sm. and M., 157.

Fisk vs. Jefferson Police Jury, 116 U. S., 131.

1 Dillon on Municipal Corporations (4 Ed.) § 276.

Coler vs. Dwight School Township, 3 N. Dak., 249, 256.

(*b*) But we do not concede that in this case the original city must be treated as having been a mere *de facto* corporation. As to this plaintiff, it was *de jure*.

1 Sayles Texas Civil Statutes, Arts., 506-514.

Callaghan vs. Salliway, 5 Tex. Civ. App., 239.

Kayser vs. Trustees of Bremen, 16 Mo., 88.

State vs. Weatherby, 45 Mo., 17.

2 Freeman on Judgments, Sec. 531.

State vs. Sanderson, 54 Mo., 203.

Morris vs. The State, 65 Texas, 53.

Laird vs. City of DeSoto, 22 Fed., 421, per Mr. Justice Miller.

Hill vs. City of Kahoka, 35 Fed., 32.

People vs. Murray, 73 N. Y., 535.

Statutes of Ontario, 55 Vic., p. 265.

II.

The Circuit Court erred in refusing to hold that the act of the twenty-second legislature of the State of Texas, entitled "An act to amend article 541, chapter 11, title 17 of the Revised Statutes of the State of Texas" (being chapter 77) approved April 13, 1891, is no bar to plaintiff's recovery in this case.

1 Sayles Civil Statutes, Arts. 540, 541.

The State vs. Eidson, 76 Tex., 302.

Ewing vs. The State, 81 Tex., 172

Ewing vs. Commissioners of Dallas County, 83 Texas, 663.

Spencer vs. Merchant, 125 U. S., 345.

White vs. City of Quanah, 27 S. W. Rep., 839.

Same case, 28 S. W. Rep., 1065.

III.

The Circuit Court erred in refusing to hold that the said act (Chapter 77 of the Acts of 1891 of Texas) as construed by the Supreme Court of that State, is in conflict with Section 10 of Article I. of the Constitution of the United States in that it impairs the obligation of the contracts sued on by plaintiff.

White vs. City of Quanah (Tex. Civ. App.), 27 S. W. Rep., 839.

Barnitz vs. Beverly, 163 U. S., 118.

Bronson vs. Kinzie, 1 Howard, 311.

Fisk vs. Jefferson Police Jury, 116 U. S., 131.

Ralls County Court vs. United States, 105 U. S., 735.

United States vs. New Orleans, 98 U. S., 381, 393.

Commonwealth vs. Allegheny County, 37 Pa. St., 277.

State vs. City of Milwaukee, 25 Wis., 122, 133.

Wilson vs. City of Florence, 40 So. Car., 426.

Scotland County Court vs. Hill, 140 U. S., 41.

Von Hoffman vs. Quincy, 4 Wall., 535.

Ogden vs. Saunders, 12 Wheat, 213.

Mount Pleasant vs. Beckwith, 100 U. S., 514, 532.

Seibert vs. Lewis, 122 U. S , 284.

Louisiana vs. Pilsbury, 102 U. S., 278, 301.

Edwards vs. Kearzey, 96 U. S., 595.

IV.

The Circuit Court erred in holding that J. G. Preusser and John F. Moorkens, who signed the bonds, were not respectively *de facto* mayor and *de facto* secretary of the City of San Angelo, as the same was organized when the bonds were issued.

1 Sayles Civil Statutes, Title 17. Chap. 2, Art. 344; Chap. II, 515, 518.

1 Dillon on Munic. Corp. (4 Ed), p. 355, Sec. 276.

12 Am. L. Reg N. S., 184, 185.

City of Guthrie vs. The Territory, 1 Oklahoma, 188, 193.

Town of Decorah vs. Bullis, 25 Iowa, 12.

State vs. Parker, 25 Minn., 215.

State vs. Atlantic Highlands, 50 N. J. L., 457.

Welch vs. Ste. Genevieve, 1 Dillon, 136.

Coler vs. Dwight School Township, 3 N. Dak., 249, 253.

Adams vs. Lindell, 5 Mo. App. 197, 72 Mo., 198.

Norton vs. Shelby County, 118 U. S., 425.

Donough vs. Dewey, 82 Mich., 309.

21 L. R. A., pp. 141–144, note.

ARGUMENT.

I.

The Circuit erred Court, in refusing to hold that the defendant, the present City of San Angelo, is the successor in law of the City of San Angelo, as the same was organized when the plaintiff's bonds and coupons were issued, and as such is bound to pay said bonds and coupons.

1. Before entering upon a discussion of this question, it is proper to observe that the bonds were issued for the purpose of improving the streets of the city, a purpose for which bonds could lawfully be issued, and that the requirements of the law were strictly pursued. The averments of the petition showing this are found in the fourth, fifth, sixth and seventh paragraphs, *Supra*, pp. 3-5.

The statutes on the subject are the following:

1 Sayles Civil Statutes of Texas, Arts. 420 to 425.

Texas General Laws, 1887, Ch. 55.

Aside, therefore, from questions growing out of the disincorporation of the first City of San Angelo, no objection can be or is made to these bonds.

2. *At the time the bonds were issued, San Angelo was a corporation de facto.*

Further on we shall show that this plaintiff has a right to treat the original city as a *de jure* corporation. For the present we will consider it only as one *de facto*.

The record shows that on the eighteenth day of January, 1889, the county judge of the County of Tom

Green, in said State, made an entry upon the record of the Commissioners' Court of said county setting forth that the inhabitants of the Town of San Angelo in said county were then and there incorporated as a city with limits and bounds particularly described; that on that day said city contained more than one thousand inhabitants; that immediately thereafter an election was held in said city, pursuant to an order of said county judge, at which election a mayor, a marshal and five aldermen were elected, who thereupon organized a government for said city, and entered upon the performance of their duties as such officers; that from that time forward said city and its inhabitants conducted a city government, held elections, enacted and enforced ordinances, made contracts, created and paid debts and salaries, levied and collected taxes, created public city improvements, and in every way performed the functions of a city. *supra*, p. 2.

The steps taken in the organization of this city are those required by the law of Texas, to be taken in organizing a city of this class.

> 1 Sayles Civil Statutes, Title 17, Chap. I, Art. 340, Chap. XI, Arts. 506 to 514, pp. 150, 193.

The record further shows that after the bonds were issued and their proceeds had been used, towit: at the fall term, 1890, of the District Court of Tom Green County, one T. C. Winn, then the County Attorney of said county, at the instance of one D. D. Wallace, a citizen and tax-payer of said town of San Angelo, by leave of said court, filed an information against J. G. Preusser, W. S. Veck, Marion Robertson, Joseph Tweedy, W. S. Kelley and J. S. Shupert, wherein it was alleged that said Preusser, Veck, Robertson, Tweedy, Kelley and Shupert were exercising and

performing the duties, privileges and functions of a mayor and city council of said City of San Angelo, claiming the same to be a city duly and legally incorporated by virtue of Chapter 11, Title 17, Revised Statutes of said State, whereas, in truth and in fact, as it was alleged, said city was never legally incorporated and said defendants were unlawfully performing and exercising said functions; and the said information prayed that said defendants be cited to appear and show cause, if any they had, why they should not be ousted from office; and further prayed that said incorporation be declared null and void; that thereupon such proceedings were had in said case that on the fifteenth day of December, 1891, the said District Court entered a decree ousting the said defendants from their said offices and adjudging that the incorporation of the said City of San Angelo be and the same was abolished and declared to be null and void. *Supra, p. 5.*

The record does not affirmatively show the ground upon which the District Court of Tom Green County acted in decreeing disincorporation, but when it comes to set up the facts touching the subsequent incorporation of the present city, it does say that the latter includes all the lands that had been within the limits of the first city "actually occupied and inhabited as a town." In Texas it is cause of disincorporation if a town or city includes more land than is so actually occupied and inhabited.

The State vs. Eidson, 76 Texas, 302.

Ewing vs. The State, 81 Texas, 172.

It may therefore perhaps be legitimately inferred that the defect in the first organization consisted in the fact that lands were embraced within the limits which were not actually occupied and inhabited as a town. But

whether this was the cause of disincorporation or not, it is manifest that the original city was a *de facto* corporation.

Ewing vs. The State, 81 Texas, 172, 180;

School District vs. The State, 29 Kansas, 57, 65.

Two things, it has been said, are necessary to be shown in order to establish the existence of a corporation *de facto*, viz: 1. The existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and, 2. A user by the party to the suit of the rights claimed to be conferred by such charter or law.

Methodist Episcopal Church vs. Pickett, 19 N. Y., 482, 485.

Again it has been said that "to be a corporation *de facto*, it must be possible to be a corporation *de jure*, and acts done in the former case must be legally authorized in the latter, or they are not protected or sanctioned by the law. Such acts must have an apparent right".

Everson vs. Ellingson, 67 Wis., 634.

Both of these expressions were used of private corporations, but they are equally true of public.

A corporation dissolved for illegality is expressly recognized by the laws of Texas as a *de facto* corporation before dissolution.

General Laws 1891 Chap., 77, page 95.

3. *Being a de facto corporation, the original city could make valid and enforcible contracts.*

As a matter of public policy the courts all agree in holding that the acts of a *de facto* corporation, like those

of a *de facto* officer, must be treated as valid and unquestionable, so far as concerns third persons.

Harper County vs. Rose, 140 U. S., 71;

People vs. La Rue, 67 Cal., 526.

2 Morawetz on Corporations, Secs. 746, 750.

Douglass County vs. Billes, 94 U. S., 104;

Leavenworth County vs. Barnes, 94 U. S., 70.

County vs. Shores, 97 U. S., 277.

American Salt Co. vs. Heidenheimer, 80 Texas, 344.

Cowell vs. Springs Company, 100 U. S., 55, 60.

Camp vs. Byrne, 41 Mo., 525.

Finch vs. Ullman, 105 Mo., 255.

Some of these cases relate to private corporations. But it is said that the reasons for the rule are even more urgent as applied to public than private corporations.

Zearfoss vs. Philadelphia, 154 Pa. St., 449.

And on the other hand it has been held that when municipal corporations contract debts for their own purposes and issue bonds therefor, they are to that extent to be deemed private corporations, and their obligations are secured by all the guarantees which protect engagements of private individuals.

Broughton vs. Pensacola, 93 U. S., 269.

Mount Pleasant vs. Beckwith, 100 U. S., 514, 529.

The plaintiff's bonds were, therefore, lawful obligations of the first city. That there may be lawful obligations created by such a corporation is plainly recognized by the foregoing act of 1891. The language is: "The new corporation shall assume all *the legal indebtedness, contracts and obligations of the old corporation.*"

4. *Being a de facto corporation, the original city was subject to suit on these bonds, and could not have pleaded the illegality of her own organization.*

Franklin Savings Institution vs. Board of Education, 75 Mo., 408.

Ashley vs. Board of Supervisors, 8 U. S. C. C. A. 455, 461; 16 U. S. App., 656, 668.

Coler vs. Dwight School Township, 3 N. Dak., 249, 257.

Stockle vs. Silsbee, 41 Mich., 615.

Aller vs. Town of Cameron, 3 Dillon, 198, per Dillon, J.

Mendenhall vs. Burton, 42 Kan., 570.

Town of Enterprise vs. State, 29 Fla., 128.

Austrian vs. Guy, 21 Fed., 500.

City of St. Louis vs. Shields, 62 Mo., 247.

In no state is the principle on which these decisions rest, better settled than in Texas.

Thus, in Graham vs. City of Greenville, 67 Tex., 62, it is said: "If a municipality has been illegally constituted, the State alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter."

So it has been held that in a suit by taxpayers against a city incorporated under the general law and its tax collector to enjoin the collection of certain city taxes, on the ground that the requirements of the law had not been complied with in creating the corporation, it was held that this question could not be raised in such a collateral proceeding.

Brennan vs. Bradshaw, 53 Tex., 330.

So, an owner of property sold for taxes by a city cannot avail himself, as a defense to the tax deed, of the invalidity of the city's incorporation, where it is shown to have been a *de facto* corporation during all the time of its exercise of the taxing power.

Eustis vs. City of Henrietta (Tex. Civil Appeals), 37 S. W. Rep., 632.

Other decisions by the same court are:

McCrary vs. City of Comanche, 34 S. W. Rep., 679.

Troutman vs. McClesky, 27 S. W. Rep., 173.

5. *The present city has succeeded to the liability of the former.*

The disincorporation of the former city left bonds which were issued for a lawful purpose, upon a valuable consideration and in strict conformity to law, temporarily unenforcible for want of a maker who could be sued. What would have been the rights or the remedy of this plaintiff if no incorporation had risen in the place of the one destroyed, may be matter of question. But this we have no occasion to consider. The record shows that on the 10th of February, 1892, exactly sixty-seven days after

the decree was passed dissolving the first city, the county judge entered the order creating the present one. It also shows that the present city embraces within its limits all the land that had been within the limits of the former, and which was actually occupied and inhabited as a town, and includes all the streets and improvements created or acquired by the original city, with the proceeds of these bonds, and all the public buildings and property of the original city, and that said city and the inhabitants thereof are now and long have been daily using said streets, improvements, buildings and property, so purchased and created with the proceeds of said bonds.

The outlying unoccupied lands were left out, and this is the only difference between the two cities. Under this state of facts the new city became the successor in law of the old and as such became bound to pay these bonds and their coupons.

The courts everywhere agree that when one municipal corporation is superseded by another, embracing substantially the same body of inhabitants, the successor, by operation of law, becomes responsible for all the debts of the predecessor. This is the rule whether the first corporation is abolished by voluntary surrender of its charter, by legislative repeal, by judicial decree, or by merger or annexation.

Broughton vs. Pensacola, 93 U. S. 266.

Mount Pleasant vs. Beckwith, 100 U. S. 514.

Mobile vs. Watson, 116 U. S. 289.

Riley vs. Garfield Township, 54 Kansas 463.

The School District vs. The State, 29 Kansas 57.

Ruohs vs. Athens, 91 Tenn. 20.

Hill vs. Kahoka, 35 Fed. 32.

Brewis vs. Duluth, 13 Fed. 334.

Laird vs. De Soto, 22 Fed. 421.

Devereaux vs. Brownsville, 29 Fed. 742.

O'Connor vs. Memphis, 6 Lea 730.

Amy vs. Selma, 77 Ala. 103.

Schriber vs. Langlade, 66 Wis. 629.

People vs. Board of Supervisors, 94 N. Y. 263.

Ross vs. Wimberly, 60 Miss. 345.

1 Dillon Munic. Corp., (4 Ed.), Secs. 169–174.

Tiedeman on Munici. Corp., Secs. 42, 43.

The settled rule is that "the obligation of contracts, made whilst the corporation was in existence, survives its dissolution."

Broughton vs. Pensacola, *supra*.

The cases all show that no statute is needed to make the debt binding on the successor. In some of them the legislation exhibited a distinct purpose to the contrary. In others there was simply an absence of provision. Of this latter class are two Missouri cases.

In one of these defendants were sued as members of the Board of Education of the City of Springfield for salary due plaintiff as teacher of the public school of subdistrict No. 3, township 13, range 22. It appeared that after the salary accrued all the territory comprising the subdistrict was annexed to the City of Springfield for school purposes. This was done in pursuance of the general school law, which provided for annexation in such cases, but made no provision for the debts of the annexed district. The court said:

"Where one corporation goes entirely out of existence by being annexed to or merged in another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property and be answerable for all the liabilities. After subdistrict No. 3 had ceased to exist, there was then no power remaining as an independent organization in its behalf to control its funds or pay off its indebtedness. Its property passed into the hands of the defendant, and when the benefits were taken the burdens were assumed."

Thompson vs. Abbott, 61 Mo., 176.

This case is cited with approval in Mount Pleasant vs. Beckwith, *supra*.

In Hughes vs. School District, 72 Mo., 643, it was held that it a public corporation be abolished by law and in its stead several new corporations be created, but no provision be made for th payment of existing debts, each of the new corporations becomes liable for all of them.

The cases above cited from the 93d, 100th and 116th volumes of the reports of this court illustrate the gradual development of the law on this subject, and, if we mistake not, make it plain that a case can hardly arise where this court will not require one municipal corporation succeeding to all the substantial rights of another to respond also to its debts.

In the first of them, *Broughton vs. Pensacola*, the court refused to treat the proceedings that were taken as working the abolition of the old corporation and the creation of a new one, but rather considered them as amounting to a continuation of the old, and upon this ground held the new city liable.

In *Mount Pleasant vs. Beckwith*, the court, impelled by the requirements of obvious justice, took a step further, and held that where an indebted town was extinguished by legislative act, and its territory was divided between

and annexed to two adjoining towns each of which was invested with powers of taxation, but no provision was made in the act for the payment of the debt, it nevertheless attached to the two towns ratably and its payment became obligatory upon them.

Mr. Justice Clifford said:

"When the appellant towns accepted the annexation, their authorities knew or ought to have known that the extinguished municipality owed debts, and that the act effecting the annexation made no provision for their payment. They had no right to assume that the annulment of the charter would have the effect to discharge its indebtedness or to impair the obligation of the contract held by its creditors *to enforce the same against those holding the territory and jurisdiction by the authority from the legislature, and the public property and the power of taxation previously held and enjoyed by the extinguished municipality.*"

In *Mobile vs. Watson* the court had to go a step further. The legislature of Alabama had by statute abolished the City of Mobile, and by separate statute created the Port of Mobile, without making any provision for payment of the debt of the city. Subsequently it had passed an act prohibiting the officials of the Port of Mobile from levying the tax originally provided by law for payment of the bonds held by the plaintiff Watson. The port embraced about one-half the territory that had been included in the city, and about fourteen-fifteenths of the taxable property and the same proportion of the inhabitants of the city. The legislative intent to create a new and distinct corporation free from liability to the creditors of the old was manifest, but this court refused to allow it to prevail. Mr. Justice Woods said (at page 300):

"Where the legislature of a State has given a local community, living within designated boundaries, a municipal organization and by a subsequent act or series of acts repeals its charter and dissolves the corporation and incorporates substantially the same people as a

municipal body under a new name for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new."

These three cases all treat of debts created by *de jure* corporations. The bonds now in question were issued by a corporation which, since their issue, has been adjudged void. If that adjudication is binding on this plaintiff, then the City of San Angelo, which issued the bonds, must be considered in this action as only a *de facto* corporation.

This raises the question, will the same rule be applied where the antecedent corporation was only a *de facto* as where it was a *de jure* corporation?

(a) We think the principles applied in the cases cited have no relation to this distinction. The rule that the successor must pay the debt of the predecessor is not founded upon any principle of technical law, for according to that the extinction of the corporation wrought extinction of the debt.

Broughton vs. Pensacola, 93 U. S., 268.

Port Gibson vs. Moore, 13 Sm. & M. 157.

It is rather founded upon a principle of natural justice—a principle too broad to take account of the difference between a corporation *de jure* and a corporation *de facto*. The principle is that the community, having received the consideration which gave rise to the debt, should pay the debt, under whatever name or charter it

may be operating. From the receipt of benefits the law raises a contract to pay in this as it does in numerous other cases.

Fisk vs. Jefferson Police Jury, 116 U. S., 131.

The reasons of honesty and good policy which unite in enforcing the recognition and validation of other acts of *de facto* corporations and their *de facto* officers apply with full force to their acts in creating public indebtedness.

1 Dillon, Mun. Corp. (4th Ed.), Sec. 276.

Coler vs. Dwight School Township, 3 N. Dak., 249, 256.

The Kansas cases cited above are notable authorities for the proposition for which we are now contending.

In *Riley vs. Garfield Township*, it appeared that in 1887, the legislature of Kansas, by special act, created a county by the name of Garfield County; that the county was organized and had a regular county government for five years, and during that time created a debt and issued bonds; that in 1893 it was ascertained that the county had but 430½ square miles of territory, whereas the constitution forbade the creation of any county with less than 432 square miles; that for this reason the Supreme Court declared the act of 1887 void, and the county a nullity; that thereafter the legislature erected this territory into a township known as Garfield Township and made it a part of Finney County, and by the same act provided that this township should not become liable for any debt previously contracted by Finney County, and Finney County should not become liable for the indebtedness that had been contracted by Garfield County, and made no provision for the payment

of the latter debt. On this state of facts the court held: First, that as the statute creating the county did not show that its area was less than 432 square miles, and as it was not void upon its face, and as the county had a *de facto* organization, and as the records of such organization appear regular and valid, and as the state officials proclaimed the organization and as its validity was subsequently recognized by them and by the legislature, all of the bonds issued by Garfield County under the statute and in regular form while its organization as a county was in existence, are valid obligations in the hands of *bona fide* purchasers: Second, that the Township of Garfield was, as a public municipal corporation, the legal successor of the County of Garfield, and therefore was liable for the valid debts created by that county during its *de facto* organization and existence.

The *School District vs. The State* is equally direct. It embodies an opinion delivered by the judge of the trial court which with admirable conciseness states the whole law of the subject. The case treats of the organization of a school district under a general law, and in that respect is closely akin to the present case. The defect consisted in the fact that the county, of which it formed part, was created by an act of the legislature which thereby reduced another county below the constitutional area, as in the case of Garfield County. When the complications thereby created were eventually corrected, and the territory comprising the school district was returned to the county to which it originally belonged, and was then re-erected into a school district it was held that the district as at first constituted was a *de facto* district and that an indebtedness regularly incurred by it was binding upon the new district as its successor in law.

In Ruohs vs. Athens, 91 Tenn., 20; it is held that where an attempt was made to incorporate a town under

the statute of Tennessee, but the sheriff who held the election necessary to incorporation failed to indorse a certificate of the election on the application for charter when the latter was registered, and the statute expressly provided that such failure should invalidate the whole proceeding, there was no incorporation and no power in the supposed town to issue bonds. But said the court: "Such a rule would not, of course, apply to irregularly organized corporations, or those which obtained such validity by special grant of the State or *by compliance with general law as to be merely voidable organizations, and such as the State by direct proceeding could alone dissolve.*"

The case at bar falls distinctly within this exception, as the corporate organization of old San Angelo was unassailable except in a direct proceeding, as by *quo warranto*, at the instance of the State.

Judge Dillon suggests that the true solution of the many difficulties that beset this subject "may be found in the consideration that the power of a municipality to levy taxes to pay its debts as the power existed at the time when the debts were created, is in its essence not the grant of a power to the incorporated body but to the inhabitants of the incorporated territory. In this view the power, or the contract obligation and duty of its exercise, survives the repeal of the charter and the dissolution of the old corporation, and passes equally with the obligation to pay the debt, to the inhabitants who continue to reside, under any form of organization within the municipal area in behalf of which the debt was created."

1 Dillon Mun. Corp. (4 Ed.), Sec. 173.

This view gives full force to the remark of Mr. Justice Field in *Broughton vs. Pensacola:* "The obligation of contracts, made whilst the corporation was in existence, survives its dissolution." As applied to municipal corporations, no other view will always work out the ends of justice.

The people of San Angelo were authorized by the laws of Texas to cause themselves to be incorporated as a city. The same laws vested them with authority, when incorporated, to exercise all the usual functions of a city, including, among others, the power to make local public improvements, the power to borrow money and the power to levy taxes. Desirous of the advantages of city government, they procured incorporation in the prescribed form, and later borrowed money and made improvements. After a while a mistake was discovered in the incorporation proceedings. For that the city was dissolved. Still coveting the exercise of municipal powers, the people again procured incorporation, and are now in the enjoyment of all the powers that the laws of Texas confer on cities of their class. These are the same identical powers which they had under the first organization. The corporate name is the same. The people are the same. The territory is part of the same. The "principles of equity and good conscience" were invoked to compel the people of Mount Pleasant to pay the debt of the old town of Racine. Shall this mistake of the people of San Angelo in procuring their own incorporation exempt them from the application of the same principles? They are vested with the same taxing power that they had when they issued the bonds. Adopt Judge Dillon's view that the power is in the same hands, and the only difficulty which stands in the way disappears.

(b) *But we do not concede that in this case the original city must be treated as having been a mere de facto corporation. As to this plaintiff, it was de jure.*

The order of the county judge of Tom Green County, spread upon the records of the County Commissioners' Court, adjudged that the people within the bounds described were legally entitled to be incorporated as a city.

1 Sayles Texas Civil Statutes, Arts. 506-514.

This order was judicial in its character.

Callaghan vs. Salliway, 5 Tex., Civ. App., 239.

Kayser vs. Trustees of Bremen, 16 Mo., 88.

State vs. Weatherby, 45 Mo., 17.

2 Freeman on Judgments, Sec. 531.

Plaintiff's bonds having been issued whilst this adjudication was in full force, he is entitled to its protection until it is reversed or annulled in some action to which he is a party. The record shows that he was no party to the disincorporating proceedings. The rights of a bondholder can not be thus affected by proceedings to which he is a stranger.

State vs. Sanderson, 54 Mo., 203.

As to this plaintiff, the disincorporation proceedings were *res inter alios acta*.

Morris vs. The State, 65 Texas, 53.

Laird vs. City of DeSoto, 22 Fed., 421, per Mr. Justice Miller.

Hill vs. City of Kahoka, 35 Fed., 32.

People vs. Murray, 73 N. Y., 535.

If the first city was a *de jure* corporation, this case stands on the same basis with the long line of cases from this and other courts cited above.

The Canadian law-makers have treated this subject comprehensively in the following statute:

"SEC. 55. In case of the erection of a locality into an incorporated village, or of a village into a town, or of

a town into a city, the village, town or city shall remain subject to the debts and liabilities to which the locality was previously liable, in like manner as if the same had been contracted or incurred by the new municipality."

Statutes of Ontario, 55 Vic., p. 265.

If this case arose under the laws of Canada, the former City of San Angelo would be at least "a locality" within the meaning of this section, and the present city would undoubtedly be liable. We believe that the common law of municipal corporations, as developed in this court, is adequate to the ends of justice, without the aid of such a statute.

II.

The Circuit Court erred in refusing to hold that the act of the Twenty-second Legislature of the State of Texas, entitled "An act to amend article 541, chapter 11, title 17 of the Revised Civil Statutes of the State of Texas" (being chapter 77), approved April 13, 1891, is no bar to plaintiff's recovery in this case.

The act here referred to is as follows:

Section 1. When any corporation is abolished as provided in the preceding article, or if any *de facto* corporation shall be declared void by any court of competent jurisdiction, or if the same shall cease to operate and exercise the functions of such *de facto* corporation, all the property belonging thereto shall be turned over to the County Treasurer of the county, and the Commissioner's Court of the county shall provide for the sale and disposition of the same and for the settlement of the debts due by the corporation, and for this purpose shall have power to levy and collect a tax from the inhabitants of said town or village, in the same manner as the said corporation would be entitled to under the provisions of this chapter. Provided, that when any town or city shall re-incorporate under chapters 1 to 11 of title 17, of

the Revised Civil Statutes, upon a majority of the legal voters tax paying property holders of said town or city, all property real and personal, of the old or *de facto* corporation shall be vested in the new one: and provided further, that the new corporation shall assume all the legal indebtedness, contracts and obligations of the old corporation; provided, where cities and towns have re-incorporated under chapters 1 to 11 of title 17 of the Revised Civil Statues, prior to the adoption of this act, upon a majority vote of the tax paying property owners of said city or town, all property, real and personal, of the old or *de facto* corporation shall be vested in the new one; and provided further, that the new corporation shall assume all the legal indebtedness, contracts and obligations of the old corporation.

Section 2. In all cases where the Commissioners' Court shall be vested with the authority conferred on them by this act, it shall be the duty of such court to appoint a suitable person to perform the duty of tax collector, whose duty it shall be to collect the tax within the territory comprised in the dissolved corporation, until such legal indebtedness of such corporation has been paid off or until such city or town has been re-incorporated, and shall fix his bond in sufficient penalties to protect any fund collected. Provided, that such appointee may be removed at any time for carelessness or insufficiency or other good cause.

Gen. Laws Texas, 1891, Chap. 77, p. 95.

The provisions of the Revised Civil Statutes on this subject are as follows:

Article 540. *Corporation may be abolished, how.* When fifty of the voters of any incorporated town or village shall desire the abolishment of such corporation, they may petition the county judge to that effect, who shall thereupon order an election to be held in such town or village, as in the case of its incorporation, and if there be a majority of two-thirds of the voters of said corporation voting at such election in favor of abolishing such corporation, the county judge shall declare the corporation

abolished, and enter an order to that effect upon the minutes of the commissioner's court, and from and after the date of such order the said corporation shall cease to exist.

Article 541. *Proceedings when corporation is abolished.* When any corporation is abolished, as provided in the preceding article, all the property belonging thereto shall be turned over to the county treasurer of the county, and the commissioner's court of the county shall provide for the sale and disposition of the same and for the settlement of the debts due by the corporation, and for this purpose shall have power to levy and collect a tax from the inhabitants of said town or village, in the same manner as the said corporation would be entitled to do under the provisions of this chapter.

I Sayles Texas Civil Statutes, 1889, p. 197.

The question presented by this fourth assignment of error grows out of defendant's second special exception to the petition. This exception makes the point that the petition fails to show that the "requisite number of qualified voters of the City of San Angelo ever at any election voted in favor of or received any property of the old corporation, or ever voted to assume or pay the debt of the old or defunct corporation, and said petition wholly fails to show that the necessary and proper elections and each of them were held as prerequisite to any liability of said defendant."

This exception proceeds upon the view that the above Act of 1891 requires such elections and votes, and the court below sustained that view.

We contend that the meaning of this Act, so far as it applies to reincorporated cities, is that the new city becomes *ipso facto* entitled to all the property of the old and subject to all its debts.

As we understand the Act, it makes it the duty of the County Commissioners Court to levy taxes for the

payment of the debts of the dissolved or abolished corporation in cases where the citizens make no attempt to reincorporate: but where reincorporation takes place, the provision is that the new corporation shall assume and pay "all the legal indebtedness, contracts and obligations of the old corporation."

These provisions are entirely consonant with justice. They aim to secure the payment of the legal debts of the dissolved corporation. If a debt was not incurred for some lawful public purpose, it is not to be assumed. So, if there was fraud in its creation, or illegality of any sort, it is not to be assumed. Only honest debts, contracted pursuant to law and founded upon proper consideration, are to have the benefit of the statute. This is as it should be. It can be no valid objection, in conscience, to the payment of a debt, that the body which contracted it afterwards turned out to be no corporation. In all ordinary cases the failure of the attempt to incorporate can not be laid at the door of the creditor. The citizens themselves have made the mistake. Nor should the creditor be held to know at his peril whether the steps they have taken are in all respects such as the law requires. How, for instance, is the purchaser of bonds offered for sale in St. Louis, by a city in western Texas, to know whether or not there is some farming land included within the limits of the city? Or if he learns that there is some, how is he to know whether or not the area is such as will invalidate the incorporation? Neither the statute, nor any decision of the courts of Texas, gives him any definite rule to go by. Again, in the case of cities organized under Chapter 60, Acts 1891, how is he to know that the area does not exceed the permitted four miles square? If there is an excess, the corporation may be dissolved.

The State vs. Eidson, 76 Tex., 302.

Ewing vs. The State, 81 Tex., 172.

Only a surveyor with his instrument can say whether there is an excess. If one creditor can be expected to inform himself as to such matters as these, all must be—as well the merchant who furnishes the city a bill of stationery for the use of its officers, or a cord of wood for the stove in the city hall, as the capitalist or widow who buys a thousand dollar bond.

Evidently there can be no such requirement. It must be true that when a stranger sees the community enjoying the benefits of municipal government he may rightly assume that they are lawfully enjoying them.

Chapter 77 of the acts of 1891, as we think it should be understood, only recognizes these principles and declares a remedy for a situation threatening undeserved loss to innocent people.

This view of this statute has met with approval in Texas courts.

In Ewing vs. Commissioners of Dallas County, 83 Texas, 663, (decided in 1892) the act came before the Supreme Court for consideration. Ewing and others, ex-officials of the disincorporated City of Oak Cliff, sued to compel the Commissioners' Court to levy a tax on the property within the limits of the late city to pay their salaries. There had been no re-incorporation. The court, unmindful of the law as laid down in Spencer vs. Merchant, 125 U. S., 345, held that the action could not be maintained, giving as a reason that the legislature had no power to cause a tax to be levied upon the property of the people living within the boundaries which there had been an unavailing effort to incorporate. But the court added:

"It would seem under facts such as are stated in the petition that a municipal corporation brought into existence by the voluntary action of persons living in that part of the territory formerly sought to be incorporated, which might legally be incorporated by reason of its being

a city or town in fact, might be made liable for the debts of what is termed the '*de facto* corporation' if they be incorporated after the passage of the act in question; for *by the act of incorporating with knowledge of the terms on which the law permitted them to do so*, they might be held to voluntarily assume the payment of the debts of the *de facto* corporation. It would generally be found true that those who do 're-incorporate' under the law receive the benefits from which result the indebtedness."

In White vs. City of Quanah, 27 S. W. Rep., 839, the Texas Court of Civil Appeals (an intermediate court) in express terms construes this act as we contend it ought to be construed. This case was reversed by the Supreme Court on writ of error, and the doctrine was announced that under this act there must be a vote of the tax-paying voters in favor of assuming the debt before the new incorporation can be held for it.

White vs. City of Quanah, 28 S. W. Rep., 1065.

In the case of *Ewing vs. The Commissioners*, the Supreme Court had considered the Act of 1891 in two aspects: First, as it related to cases in which "re-incorporation" had not taken place; second, as it related to cases in which "re-incorporation" had taken place.

As to the first it was decided that the act conferred on the Commissioners Court no power to levy taxes on the inhabitants of the disincorporated territory to pay the debts of the dissolved or abolished corporation. Stayton, J., said:

"And we are of opinion that the legislature has no more power to cause a tax to be levied upon the property of the people living within the boundary which there was an unavailing effort to incorporate, for the purpose of paying the claims of appellants, than would the legislature have to say that a tax might be levied upon the property of any hundred citizens of the State and collected for the same purpose. The property of the citizen can not thus

in effect be taken without his consent, which under the facts alleged can not be implied. Such legislation, if sustained, would deprive the citizen of his property without due course of the law of the land, and would authorize the taking of private property for public use without compensation or the owner's consent."

As to the second case the opinion was expressed that "*by the act of incorporating* with knowledge of the terms on which the law permitted them to do so, they (the citizens) might be held to voluntarily assume the payment of the debts of the *de facto* corporation."

In the Quanah case the Supreme Court directly negative this last position holding, as above stated, that "*the act of incorporating*" is not of itself sufficient to impose the debt on the new corporation, but that act must be followed by express assumption by vote of the people.

They also negative the view expressed in the Ewing case on the other point.

Brown, J., said: "By the dissolution of the old corporation its property passed into the control of the Commissioner's Court of that county, and *the court was thereby invested with the power to levy taxes to pay the debts of the dissolved corporation.*"

In view of these varying decisions we do not believe it can be said that the construction of this statute is settled in the Texas courts.

Again, in the Quanah case the Supreme Court says: "To enable the new town to pay the debts and resume its power of taxation for that purpose, the proviso was inserted. Now, if the town takes the property, it is reasonable that it likewise should assume the debts."

This is the basis of the argument of the court in its construction of this statute. How does it apply to a case like the present, in which, as the record shows, the new city has taken and is using the streets made with the plaintiff's money? If such a case came before it would

that court adhere to its conclusion and abandon its argument; or would it not rather, in the interest of justice, adhere to its argument and hold that as applied to such a case the statute must receive the construction the plaintiff contends for? In the present condition of the decisions we believe the way is perfectly open to the latter course; and we confidently submit that this court may well adopt our view without violating established rules as to the construction of State statutes.

III.

The Circuit Court erred in refusing to hold that the said act (Chapter 77 of Acts of 1891 of Texas) as construed by the Supreme Court of that State, is in conflict with Section 10 of Article 1 of the Constitution of the United States in that it impairs the obligation of the contract sued on by plaintiff.

This question also grows out of the defendant's second special exception to the petition. As before stated, the court sustained this exception, holding that under the Act of 1891 no debt was assumed until the qualified voters voted to assume.

In this the court below followed the ruling of the Supreme Court of Texas in the *Quanah case* above referred to, holding that in addition to the election on the question of reincorporation, there must be a subsequent vote on the question of accepting the property and assuming the burdens of the former corporation before they could be assumed.

We insist that if this is the true construction of the act, it amounts to an impairment of the contract evidenced by plaintiff's bonds and is void.

We have shown above that in a case like the present, in the absence of a controlling statute, the obligation of the contract of the antecedent corporation survives and

attaches to its successor when one arises. This is the distinct holding of this court in Broughton vs. Pensacola, and other cases *supra*. This quality is an incident which inheres in every municipal bond, and is as much a part of it as if it were expressed in terms.

It is an incident annexed, not by any particular statute or special feature of local jurisprudence, but by the general law of the land. It has been so held by this court in cases arising in Florida, Wisconsin and other States. The same principles lead to the same result in Texas. There, as elsewhere, apart from statute—the successor or corporation is liable for the debts of its predecessor.

> White vs. City of Quanah (Tex. Civ. Ap.), 27 Tex., 839.

In the year 1889, when the plaintiff's bonds were issued, there was no statute on this subject in Texas. It follows that the plaintiff took these bonds with the right annexed to enforce them against any corporation which might become successor in law to the one which issued them. This right is protected by the constitution from invasion by the State Legislature as fully as any other right, and as fully as if it had been written in the bonds. The decisions of this court abundantly show that protection is extended, not only to rights secured by express provisions of contract or statute, but also to those implied or annexed by law, or which under the operation of the general law of the land have come to be considered as part of or inhering in the contract.

> Barnitz vs. Beverly, 163 U. S., 118.
>
> Bronson vs. Kinzie, 1 Howard, 311.
>
> Fisk vs. Jefferson Police Jury, 116 U. S., 131.
>
> In *Barnitz vs. Beverly*, Mr. Justice Shiras said (at p. 131.):

Martha Barnitz held Kirtland's notes secured by a mortgage. Of course, under the contract thus created she had a right to resort to other property of the debtor to make up for any deficiency remaining after the sale of the real estate mortgaged. As the law stood at the time the contract was made, if Kirtland, either by purchase at the sale or by subsequent transactions, became the owner of the real estate, Mrs. Barnitz had a legal right to again levy thereon and subject it to the payment of the remnant of her debt. But this law, as we have seen, in express terms declares that this real estate shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold. This cannot be held to mean merely that the land is sold free from existing liens, for such would be the legal effect of the sale at any rate. It plainly means that the balance of the debt shall not be made out of the lands, even if and when they become the property of the debtor." For this reason the law was held void as impairing the obligation of the contract.

In Bronson vs. Kinzie (at p. 318), Taney, C. J., said:

"According to the long settled rules of law and equity in all of the States where jurisprudence has been modeled upon the principles of the common law * * * it is his (the mortgagee's) absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the court of chancery, and obtain its order for the sale of the whole mortgaged property, (if the whole is necessary), free and discharged from the equitable interest of the mortgagor. This is his right, by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay.

When this contract was made, no statute had been passed by the State, changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time; and, therefore, entered iton the contract, and formed a part of it without any express

stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the court of chancery. Yet no one doubts his right or his remedy; for, by the laws of the State then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were *annexed to the contract at the time it was made, and formed a part of it;* and any subsequent law, impairing the rights thus acquired, impairs the obligations which the contract imposed."

In *Fisk vs. The Jefferson Police Jury*, Mr. Justice Miller says:

"The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the State than that arising on a promissory note."

The principle that rights implied by law are protected has often been applied in cases where a bondholder claimed the right to have a tax levied to pay his bonds though the statute under which they were issued, omitted to provide a tax. In such case it has been held that such a right is "conclusively implied."

Ralls County Court vs. U. S., 105 U. S., 735.

U. S. vs. New Orleans, 98 U. S., 381, 393.

Commonwealth vs. Allegheny County, 37 Pa. St., 277.

State vs. City of Milwaukee, 25 Wis., 122, 133.

Wilson vs. City of Florence, 40 So. Car., 426.

And it is held that it cannot be taken away by subsequent legislation.

Scotland County Court vs. Hill, 140 U. S., 41.

In Von Hoffman vs. Quincy, 4 Wall., 535, Swayne, J., says (at p. 550):

"It is also settled that the laws which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. Illustrations of this proposition are found in the obligation of the debtor to pay interest after the maturity of the debt where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages and in the right of the drawer and endorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement."

In Ogden vs. Saunders, 12 Wheat., 213, Washington, J., said (at pp. 257, 259), that the obligation of a contract is the law which binds the parties to the performance of their agreement, and this law is the municipal law of the State (as contra-distinguished from the moral law) whether *it be written or unwritten.*

In all the cases cited the questions arose between the parties who made the contract or their conceded privies. The question here is whether the present City of San Angelo can be treated as a privy to the cause of action. That she could be if the act of 1891 did not stand in the way there is no doubt. As already shown, the plaintiff would have an unquestionable right to pursue her in this

action. It is the deprivation of this right which the act of 1891 is intended to accomplish.

The constitution makes no distinction between rights growing out of or inhering in contracts. All are alike to be protected.

This act can not be defended on the ground that the State, in her sovereign power over her own municipal corporations, may permit them to be created on such terms, and only on such terms, as she may see fit. It is settled that this power does not extend to an infringement of the rights of creditors.

Von Hoffman vs. Quincy, 4 Wall., 535.

Mount Pleasant vs. Beckwith, 100 U. S., 514, 532.

It remains to consider whether this statute, thus interpreted, operates to impair the right claimed by plaintiff as part of his contract. Upon this, we think, little need be said. Under this construction, the liability of the new city, instead of being absolute, becomes contingent. It depends entirely upon the willingness of the people to assume the burden, and thus ceases to be an obligation at all. Much less has been held to amount to impairment.

Seibert vs. Lewis, 122 U. S., 284.

Louisiana vs. Pilsbury, 102 U. S., 278-301.

Edwards vs. Kearzey, 96 U. S., 595.

IV.

The Circuit Court erred in holding that J. G. Preusser and John F. Moorkens, who signed the bonds,

were not respectively de facto Mayor and de facto Secretary of the City of San Angelo, as the same was organized when the bonds were issued.

This question was raised by the general exception to the petition and was decided adversely to the plaintiff, the court being of opinion that inasmuch as the original incorporation was adjudged to be a nullity, there could be no *de jure* offices and therefore no *de facto* (much less *de jure*) officers.

Saving to ourselves the right to treat this as *de jure* corporation, as already explained, we insist that the court here erred in the application of a well established rule. The City of San Angelo, as has aleady been shown, was organized under a general statute. This statute created the offices of mayor and secretary for all cities organized under it.

1 Sayles Civil Statutes, Title 17, Chap. 2, Art. 344; Chap. 11, Arts. 515, 518.

The people of San Angelo undertook to organize under this statute, obtained an order of incorporation, and set up a city government which continued in existence for nearly three years.

As already shown, the acts of this government are of necessity to be recognized as those of a *de facto* corporation. What gives it this character is the fact that, being authorized by law to be a corporation, it is acting as such though irregularly formed. Inasmuch as a corporation can act only by its officers and agents, it seems impossible to separate the acts of the one from the acts of the other, or to accord recognition to the one while denying it to the other. These bonds must be deemed the acts (or contracts) of the *de facto* corporation of San Angelo, as it existed when they were issued. This seems to carry with it recognition of the officers who signed them.

The rule on this subject is thus stated by Judge Dillon:

In this country the doctrine is everywhere declared, that the acts of *de facto* officers, as distinguished from the acts of mere usurpers, are valid, and the principle extends not only to municipal officers generally, but also to those composing the council, or legislative or governing body of a municipal corporation. But in order that there may be a *de facto* officer, there must be a *de jure* office: and the notion that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law; and, therefore, a person cannot claim to be a *de facto* officer of a municipal corporation *when the corporation or people have, in law, no power, in any event, to elect or appoint such an officer.*

1 Dillon Munic. Corp. (4 Ed), p. 355, Sec. 276.

Judge Redfield thus defines a *de facto* officer:

"One who by right, but without having complied with all the formal requisites and qualifications, or else *by mistake* and misapprehension, or perhaps by downright wrong and gross usurpation, is, for the time, exercising the functions of the office, and whom from necessity all persons having to do with such functions must employ, and to whose acts all must submit, since he holds the insignia of the office and the power to enforce obedience to his demands. * * * And if we look further, and reflect upon the principle of the rule that the acts of an officer *de facto* shall be held valid as to the parties connected with the transactions, without regard to the officer's rightful title, we must conclude that whenever a case arises where one is wrongfully exercising the functions of an office in any new mode not hitherto found in the cases, the principle must be made to embrace the new case, or else by refusing it we virtually deny the soundness of the rule itself."

12 Am. Law Reg. N. S., 184, 185.

If there is no law authorizing the creation of a corporation, neither the supposed corporation nor its officers

can be recognized in any character. Such was the status of the provisional municipal organizations made in the territory of Oklahoma before the act of congress of May 2, 1890, providing for a territorial government.

City of Guthrie vs. The Territory, 1 Oklahoma, 188, 193.

So if there be no law creating the office, though the corporation be lawfully existing, one who assumes to fill the office will not be treated as entitled to any legal recognition. Thus where the authorized organization consisted of a board of six trustees and a president, but the actual organization consisted of a board of five trustees, a mayor and a recorder, it was held that the person who assumed to act as mayor was not a *de facto* officer.

Town of Decorah vs. Bullis, 25 Iowa, 12.

But it has been said that there is a clear distinction between the case of one claiming to fill an office unkown to the law, and one in which, while the office may not exist in the particular instance, yet it is known to the law. In the former case the acts of such a person "would not have any semblance of legal effect."

State vs. Parker, 25 Minn., 215.

It has been held that where a community is illegally organized as a public corporation the governing body are officers *de facto*.

State vs. Atlantic Highlands, 50 N. J. Law, 457.

It is enough that the office is created or authorized by the legislature.

Welch vs. Ste. Genevieve, 1 Dillon, 136.

In a very recent case it was said:

"Nor could it be successfully contended that such officers were not at least *de facto* officers, there having been an attempt to comply with the law requiring the furnishing and filing of the description (of the boundaries of the district) before officers should be elected, and the officers being in the actual possession of their respective offices and exercising the functions thereof, and there being no other persons pretending to lay claim to such offices. Nor would we reach a different conclusion were we of opinion that the organization of the district was so defective that the proceedings would be set aside on *certiorari*, or the right of the district to act as such would be denied by judgment in *quo warranto*. At the time these bonds were issued the district was acting as a *de facto* district under at least color of organization. It had elected its district officers; held its district meetings; had voted to borrow money to build a school-house; and it appears to be undisputed that the proceeds of these bonds were used for that purpose, and the inhabitants received the benefit thereof. A school-house has been built and school has been taught therein. To allow the defense that the proceedings in the organization were defective to defeat the debt represented by these bonds would, under these circumstances, be to sanction repudiation of an honest obligation."

Coler vs. Dwight School Township, 3 N. Dak., 249, 253.

In the St. Louis Scheme and Charter case, the question was of the validity of an ordinance of the City of St. Louis passed by the "City Council" on the 5th of December, 1876, authorizing certain street paving work. On the 22nd of August previous, an election had been held in said city to determine whether a new charter should be adopted. By the terms of this charter the "City Council" (a body composed of one house, and existing under previous laws), was abolished, and in its place was substituted the "Municipal Assembly" (composed of two

houses), and it was provided that if the new charter obtained the requisite majority vote it should take effect and be in force from and after the 22nd of October, 1876. The election returns, as at first reported, showed a majority against the new charter, and the city government continued to operate under the old charter until after December 29, 1876. About that date it was discovered that the first returns were false, and on that day a certificate was filed by the proper officers showing that the new charter had been adopted. Shortly thereafter it was put in force, and the city government was re-organized in accordance with its requirements. In opposition to a special tax bill issued under the ordinance of December 5th, it was contended that as the City Council was abolished by the adoption of the charter it ceased to exist after the 22nd of October, and therefore the ordinance could not be treated as the act of *de facto* officers, since there were then no *de jure* offices.

But this contention was disallowed, on the ground that the council had continued to act under a mistake as to a fact (namely the vote) in regard to which the court held the policy of the law forbade that individuals should be required to inform themselves at their peril; that, therefore, it had a perfect color of right which justified individuals in concluding that its members were legal officers holding legal offices, and that its acts done before the truth was ascertained must be upheld.

Adams vs. Lindell, 5 Mo. App., 197.

This decision was affirmed by the Supreme Court.

Adams vs. Lindell, 72 Mo. App., 198.

See also: State vs. Sutton, 3 Mo. App., 388.

State vs. Finn, 4 Mo. App., 347.

Nothing said or decided in *Norton vs. Shelby County, 118 U. S., 425*, militates against our position. Barbour Lewis and his associates were in that case adjudged to be mere usurpers, and not county commissioners, because the act of the legislature which created the Board of County Commissioners was unconstitutional, and had been assailed as such in the courts by the justices of the peace of the county, who were the lawful officers and had always been ready and willing to act as such, immediately after its enactment. There were no *de jure* offices it was said, and, therefore, no *de facto* officers.

Another court of recognized authority has held that this rule must be modified to this extent, that an office created by the legislature is to be deemed one *de jure*, so long as the law is treated by the public as valid, though it should afterwards be held otherwise.

Donough vs. Dewey, 82 Mich., 309.

After a careful review of the cases arising under unconstitutional statutes the learned editor of the Lawyers' Reports Annotated says:

"It would seem to be a fair deduction from the majority of the cases that an office not recognized by the constitution can not be filled so as to give validity to the acts of an incumbent as a *de facto* officer, but that where there is such an office *contemplated in the constitution* the acts of a person attempting to fill it may be upheld as those of a *de facto* officer although his claim to the office depends on an unconstitutional statute."

21 L. R. A., pp. 141-144, note.

In Norton vs. Shelby County, Mr. Justice Field said: "Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insigna of the office and exercises its powers and functions."

We think the foregoing cases show that within the meaning of the rule relied on by the defendant, the offices of Mayor and Secretary of San Angelo were *de jure* offices. They were created by law of unquestioned validity, and were occupied without contest from adverse claimants, and for nearly two years without objection by the State. It is not material that the citizens, in organizing, failed to follow the law. In the language of Judge Dillon: "A person cannot claim to be a *de facto* officer of a municipal corporation, when the corporation or people have, in law, no power, in any event, to elect or appoint such an officer." This is not such a case. The people of San Angelo had power the choose a mayor and a secretary, if the city was lawfully organized. Preusser and Moorkens, therefore, had a right to claim these offices, and third persons not only had a right, but were bound to recognize their claim. If some farming lands were included within the city limits, either through ignorance of law on the part of the incorporating citizens, or through disregard of it, this should not affect the rights of strangers dealing with their chosen officers.

The law of *de facto* officers and corporations is the outgrowth, not of technical law learning, but of public necessity dealing with embarrassing conditions. Under it we think the plaintiff had and has a right to treat Preusser and Moorkens as Mayor and Secretary of the City of San Angelo and to rely upon their signatures to the bonds as such.

Respectfully submitted,

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